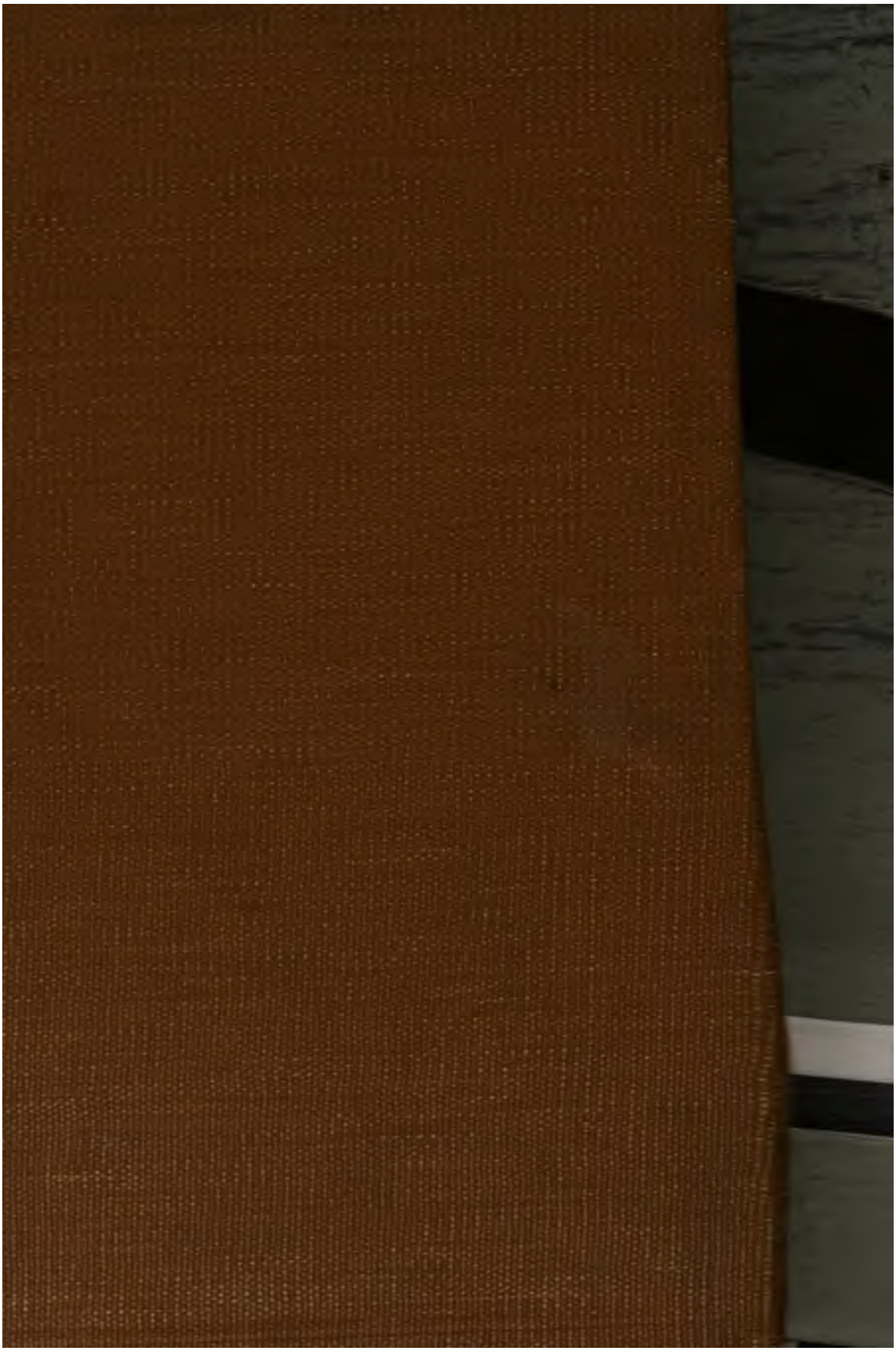

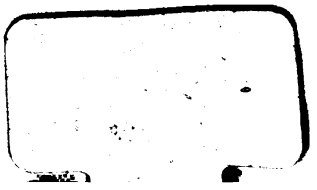

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THE FEDERAL EMPLOYERS' LIABILITY ACT

BEING A

Treatise on the Federal Act of April 22, 1908, and the Amendment of April 5, 1910

BY

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Preface

The rights and liabilities of carriers by rail and their employees under the Federal Employers' Liability Act is a subject of the widest possible interest. No lawyer bringing or defending an action against a carrier by rail for the death or injury of an employee can afford to take a single step without a thorough knowledge of its provisions and of the decisions thereunder. It is the purpose of this little volume to set up the waymarks and enable the practitioner to get his bearings from an examination of the principles, developed in the light of decided cases, and herein set forth. To this end, the author has endeavored, not to put any great amount of originality into the composition of the text, but rather to present in an orderly way and with such intelligence as he possesses the law as actually declared by the courts.

In order to keep the work within bounds, he has confined himself almost exclusively to the cases actually arising under the Acts of June 11, 1906, April 22, 1908, and the Amendment of April 5, 1910; other authorities being cited only when deemed particularly apropos. As a consequence, it is believed that each citation will be found apt and to the point.

At the beginning of the volume will be found an analytical table of the entire contents of the book with references to the page on which the discussion of each particular subdivision will be found. The few cross references to be found in the body of the work are referable to this analysis as well as to the numbered pages.

HOMER RICHEY.

Charlottesville, Va.,
Nov. 3, 1913.

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CHAPTER I

I. The General Power of Congress to Regulate the Relation of Master and Servant.

In the light of the decisions of recent years, there no longer remains any shadow of doubt that congress, in the exercise of its constitutional power to regulate interstate and foreign commerce, may regulate the relations of interstate carriers and their employees while both are engaged in such commerce, subject always to the limitations prescribed in the federal constitution, and to the qualification that the particulars in which those relations are regulated must have some real or substantial connection with the interstate commerce in which the carriers and their employees are engaged.[1] It is equally well settled that the duties of common carriers with respect to the safety of their employees, while both are engaged in commerce among the states, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real and substantial relation to such commerce, and are, therefore, within the range of this power.[2] In other

1. **General power of congress to regulate relation of master and servant.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

2. **Same—Duty with respect to safety—Liability for injuries.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169;

words, the employees of persons and corporations engaged in interstate commerce are instrumentalities of such commerce,[3] and while as a general rule the police power belongs to the states, congress, in the exercise of its power to regulate such commerce, may enact restrictive or benevolent regulations for the benefit of those employees, which regulations are, in their essential nature, police regulations.[4]

It is no valid objection to such regulations that they change or modify long-settled principles of the common law. There is no vested right in any rule of the common law, except in so far as our legislatures, state and national, may be bound down by constitutional limitations; there is no peculiar sanctity attaching to those principles of the common-law system which hold that a servant must be held to have assumed the risks ordinarily incident to his employment, including the risk of injuries resulting from the negligence of his fellow servants, and that he is not entitled to recover for any injury to which his own negligence was a contributing cause. On the other

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The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Plummer *v.* Northern Pac. R. Co. (C. C.), 152 Fed. 206; St. Louis, etc., R. Co. *v.* Conley (C. C.), 187 Fed. 949; Owens *v.* Chicago, etc., R. Co., 113 Minn. 49, 128 N. W. 1011; Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494. Contra: Howard *v.* Illinois Cent. R. Co. (C. C.), 148 Fed. 997, reversed in The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Brooks *v.* Southern Pac. R. Co. (C. C.), 148 Fed. 986; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, reversed in Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

3. Employees as instrumentalities of commerce.—Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608.

4. Nature of regulations enacted by congress.—Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Hoke *v.* United States, 227 U. S. 308, 57 L. Ed. —, 33 S. Ct. 281.

hand, the trend of present day enlightened opinion is away from such principles as being unduly harsh and oppressive to the servant class, and opposed to the better reason; and certain it is that congress, keeping within the sphere of its delegated powers, and subject to the constitutional restraints with which it is hedged about, may modify or abolish them and substitute new rules, evincing a new policy, as to it may seem good.[5]

And it is elementary that in passing upon the validity of such legislation the courts are limited, as they are in all cases, to the sole question of power. The wisdom, policy or expediency of the act, whether it is the best means that might have been chosen for the accomplishment of the desired end, or whether its enforcement will not be productive of more hardship and give rise to a train of evils, real or imaginary, greater than those which it was designed to correct, are considerations which address themselves solely to the legislative branch of the government, and its decision thereon, as embodied in the completed act, is not subject to judicial review.[6]

No Power over Carriers and Employees While Not Engaged in Interstate Commerce.—The plenary power conferred upon congress by art. 1, § 8, of the federal constitution is the power to regulate that commerce which comes within the description of interstate and foreign, and among the Indian tribes. There is no grant of power with respect to that commerce which is wholly internal or intrastate; and in addition to the want of any express grant of power with respect to such commerce, the necessary implication, arising from the dual nature of our political system, and which operates to confine the activities of both the state and national governments to their re-

5. **Modification of common-law rules.**—Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, reversed on other points in Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

6. **Judicial review—Wisdom, policy, or expediency—Courts limited to question of power.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893.

spective spheres of action, forbids that congress should undertake to regulate that commerce within the states which is wholly domestic or intrastate.[7]

This principle, of course, is perfectly plain and elementary. The difficulty arises from the fact that the vast proportion of the transportation business of the country is carried on by corporations engaged in commerce of both descriptions, the same train and oftentimes the same car carrying goods or passengers, some of which are being moved in interstate commerce, while others are being transported in that commerce which is wholly intrastate. The power of congress with respect to so much of the business of any particular carrier as properly comes under the head of interstate is not defeated, however, by reason of the fact that such carrier is also engaged in commerce which is purely intrastate. The regulation of intrastate commerce, if it can be so called, which may result in such case, is incidental and due to the manner or method in which the carrier conducts its business, and to the fact that it thus commingles its interstate and intrastate business.[8]

On the other hand, in view of the recent authoritative utterances of the Federal Supreme Court, it may be regarded as conclusively settled that an employer engaged in interstate transportation does not bring his entire business, including that which is intrastate as well as that which is interstate, within the legislative power of congress; nor does the interstate commerce clause

7. **No power over carriers or employees while not engaged in interstate commerce.**—Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942; Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 738.

8. **Same—Carriers engaged in both interstate and intrastate business.**—Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832.

of the federal constitution authorize congress to extend the provisions of an employers' liability act to those employees engaged in commerce which is wholly intrastate, except in so far as their negligence or misfeasance may affect that commerce which may be denominated interstate.[9] Therefore an act addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the nature of the business in which they are engaged at the time of the injury, of necessity includes subjects wholly outside the power of congress under the commerce clause of the constitution, and is unconstitutional and void.[10] And where the provisions of such an act applicable to both interstate and intrastate employees are so interblended as to be inseparable, the statute must fail as a whole.[11]

Where Injury to Interstate Employee Results from Negligence of Employee or Agency Not Engaged in Interstate Commerce.—Notwithstanding the principle above stated, that an employer engaged in interstate transportation does not bring his entire business, intrastate as well as interstate, within the legislative power of congress, and that congress has no authority to extend the provisions of an employers' liability act to those employees engaged in commerce which is wholly intrastate, it must be conceded that, in the exercise of its power to legislate for the better protection and safety of those

9. **Same—Same—Intrastate business not brought within legislative powers of congress.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 739.

10. **Act extending to employees injured while engaged in intrastate commerce, unconstitutional.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 738.

11. **Same—Separability of act.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Atchison, etc., R. Co. *v.* Mills, 49 Tex. Civ. App. 349, 108 S. W. 480; Brooks *v.* Southern Pac. Co. (C. C.), 148 Fed. 986; Howard *v.* Illinois Cent. R. Co. (C. C.), 148 Fed. 997.

employees who are engaged in interstate commerce, congress has the power to protect them and the commerce in which they are engaged from dangers from whatever source arising, and may, as it has done, extend the provisions of such an act to include the case of injuries to employees engaged in interstate commerce even where such injury results from the negligence of an employee engaged wholly in intrastate commerce. Thus in the Second Employers' Liability Cases, the court said:

"The second objection proceeds upon the theory that even although congress has power to regulate the liability of a carrier for injuries sustained by one employee, through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. But this is a mistaken theory in that it treats the source of the injury rather than its effect upon interstate commerce as the criterion of congressional power. * * * It is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce, for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein."[12]

The criterion, therefore, is not whether the agency or employee inflicting the injury was engaged at the time in interstate commerce, but the effect of the negligent act or omission upon such commerce.[13]

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12. Where injury to interstate employee results from negligence of employee or agency not engaged in interstate commerce.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

13. Same—Effect of negligent act or omission upon such commerce the true criterion.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 340; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942. See, also, Hall *v.* Chicago, etc., R. Co. (C. C.), 149 Fed. 564 (decided under the Act of 1906), and Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893.

In Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832, it appeared that the plaintiff was struck by a train while he and other employees were engaged in repairing a switch

In the District of Columbia, Territories, and Places under Exclusive Federal Control.—The federal power of regulation between the states rests solely upon the interstate commerce clause of the constitution,[14] and, as we have seen, does not extend to commerce which is wholly of a domestic character. But with respect to the territories, the District of Columbia, and places under exclusive federal control, the legislative power of congress is plenary, and, so far as commerce is concerned, is not dependent upon any special grant of power such as the commerce clause of the constitution; so that congress has the power to regulate their commerce, not only with other territories, states, nations and Indian tribes, but, by virtue of its general power to govern, it possesses sole and exclusive authority to regulate their internal and domestic commerce as well.[15] Hence it might be, and in the case of the first Employers' Liability Act was so held, that a statute which was unconstitutional in so far as it undertook to regulate the liability of carriers for injuries to their employees while engaged in that commerce which was wholly internal and domestic within the

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connected with a track over which both interstate and intrastate trains passed. In passing upon this point, the court said: "The plaintiff was at the time engaged in interstate commerce and entitled to the rights secured by this act. That being so, it is a matter of no consequence whether the train that struck him was engaged in that commerce or not."

In Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893, it was held that the facts disclosed by the complaint did not make it necessary to decide this point, but that the purpose to render a carrier engaged in interstate commerce liable to employees so engaged being apparent, the provisions were separate, whatever might be the rule regarding an injury resulting to an interstate employee from the negligence of an employee not so engaged. Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893.

14. Power of congress in District of Columbia, territories, and places under exclusive federal control, not dependent upon interstate commerce clause.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

15. Same.—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

states, would be valid in so far as it attempted to regulate the same subject with respect to carriers and their employees engaged wholly in internal and domestic commerce within the District of Columbia and the territories.[16]

Power Extends to All Carriers, Both on Land and Water.—With respect to that commerce over which its power extends congress has authority to legislate for the safety and protection of the employees of all carriers while engaged in such commerce, whether the transportation be on water or on land,[17] though, as we shall hereafter see, the provisions of the present act extend only to carriers by rail.

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16. **Same—Act may be valid as to territories while invalid as to states.**—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21.

17. **Power of congress extends to all carriers, whether by land or water.**—Spain *v.* St. Louis, etc., R. Co. (C. C.), 151 Fed. 522.

CHAPTER II

II. State Power and Its Limitations.

The power of the states, commonly known as the police power, to control the conduct of individuals therein for the safety of the community is not taken away by the commerce clause of the federal constitution merely because some remote influence on interstate commerce may result; but state legislation which directly and intentionally controls and regulates interstate commerce is prohibited.[18] Definitions of the police power must be taken subject to the condition that the state can not, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or upon rights granted or secured by the supreme law of the land.[19] With respect to the liability of common carriers for injuries to their employees growing out of their negligence or the negligence of their other employees, the subject is clearly a proper one for police regulation, and the states have the power, when they choose to exercise it, to make regulations on that subject, even though they may extend to and control rights and liabilities as between carriers and their employees while engaged in interstate commerce; provided, always, there is no existing federal legislation covering the same field. Such statutes, so long as they do not unreasonably interfere with interstate commerce, are not considered regulations of interstate commerce, notwithstanding they control, in some degree, the conduct and liability of those engaged in such commerce, but come rather within the category of those matters as to which the power of congress is not exclusive per se, and concerning which

18. **State power and its limitations.**—State *v.* Chicago, etc., R. Co., 136 Wis. 467, 117 N. W. 686; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

19. **Police power not to be so exercised as to encroach upon federal powers or rights protected by federal constitution.**—New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650, 661, 29 L. Ed. 516, 6 S. Ct. 252; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

the states may legislate until congress shall see fit to exercise the power vested in it. But when congress assumes to exercise its powers by enacting legislation covering the particular subject, all state legislation upon the same subject is superseded and becomes inoperative in so far as it affects the rights and liabilities of carriers and their employees while engaged in interstate commerce, and without regard to whether it is in terms abrogated or not.[20]

Territorial Statutes Superseded.—In view of the direct control which congress has over the territories, the principle just stated, with respect to state laws affecting interstate commerce being superseded by acts of congress, applies with even stronger force to statutes enacted by territorial legislatures, or, in the absence of legislation, to the rules of the common law in force within the territories. In either case, rules regulating the lia-

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20. Regulation of interstate carriers and employees—Power of congress not exclusive—Superseding state legislation.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Sherlock *v.* Alling, 93 U. S. 99, 23 L. Ed. 819; Missouri, R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107; Minneapolis, etc., R. Co. *v.* Herrick, 127 U. S. 210, 32 S. Ct. 109; Chicago, etc., R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675; Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 44 L. Ed. 192; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606; St. Louis, etc., R. Co. *v.* Hesterly (Ark.), 135 S. W. 874; Missouri, etc., R. Co. *v.* Castle (C. C.), 172 Fed. 841; Missouri R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1, 3; Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App.), 149 S. W. 1188; Bottoms *v.* St. Louis, etc., R. Co. (C. C.), 179 Fed. 318; Hall *v.* Louisville, etc., R. Co. (C. C.), 157 Fed. 464; Whittaker *v.* Illinois, etc., R. Co. (C. C.), 176 Fed. 130; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Fulgham *v.* Midland Val. R. Co. (C. C.), 167 Fed. 660; Taylor *v.* Southern R. Co. (C. C.), 178 Fed. 380; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011; Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307; Cound *v.* Atchinson, etc., R. Co. (C. C.), 173 Fed. 527.

bility of carriers for the death or injury of their employees are superseded by the legislation of congress in so far as it covers the same field.[21]

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21. Superseding territorial legislation.—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Cound *v.* Atchinson, etc., R. Co. (C. C.), 173 Fed. 527; American R. Co. *v.* Didricksen, 227 U. S. 145, 33 S. Ct. 224, 225.

CHAPTER III

III. The Federal Acts Considered.

A. Text of the Acts and the Amendments Thereto.—Act of June 11, 1906, 34 Stat. L. 252.—See the text of this act, which was held unconstitutional in the first Employers' Liability Cases,[22] set out in the footnotes.[23]

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22. The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

23. ACT OF JUNE 11, 1906, 34 STAT. L. 232.

"§ 1. That every common carrier engaged in trade or commerce in the District of Columbia, or in any Territory of the United States, or between the several states, or between any Territory and another, or between any Territory or Territories and any state or states, or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, shall be liable to any of its employees, or, in the case of his death, to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him, for all damages which may result from the negligence of any of its officers, agents, or employees, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, ways, or works.

"§ 2. That in all actions hereafter brought against any common carriers to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery where his contributory negligence was slight and that of the employer was gross in comparison, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. All questions of negligence and contributory negligence shall be for the jury.

"§ 3. That no contract of employment, insurance, relief benefit, or indemnity for injury or death entered into by or on behalf of any employee, nor the acceptance of any such insurance, relief benefit, or indemnity by the person entitled thereto, shall constitute any bar or defense to any action brought to recover damages for personal injuries to

ACT APRIL 22, 1908, CH. 149, 35 STAT. L. 65.

§ 1. (Liability of railroads for injuries to employees.) That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 2. (Damages for injuries in territories, District of Columbia, Canal Zone, etc.) That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States shall be

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or death of such employee: Provided, however, That upon the trial of such action against any common carrier the defendant may set off therein any sum it has contributed toward any such insurance, relief benefit, or indemnity that may have been paid to the injured employee, or, in case of his death, to his personal representative.

"§ 4. That no action shall be maintained under this Act, unless commenced within one year from the time the cause of action accrued.

"§ 5. That nothing in this Act shall be held to limit the duty of common carriers by railroads or impair the rights of their employees under the Safety Appliance Act of March, second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six, and March second, nineteen hundred and three."

liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

§ 3. (Contributory negligence of employee.) That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this Act to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 4. (Assumption of risk of employment.) That in any action brought against any common carrier under or by virtue of any of the provisions of this Act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 5. (Agreements, etc., for exemption from liability—set off of insurance, etc., contributions.) That any contract, rule, regulation, or device whatsoever, the purpose or in-

tent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: Provided, that in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

§ 6. (Time limit for actions.) That no action shall be maintained under this Act unless commenced within two years from the day the cause of action accrued.

§ 7. (Receivers.) That the term "common carrier" as used in this Act shall include the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.

§ 8. (Prior laws not affected.) That nothing in this Act shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of congress, or to affect the prosecution of any pending proceeding or right of action under the act of congress entitled "An act relating to liability of common carriers in the District of Columbia and territories, and to common carriers engaged in commerce between the states and between the states and foreign nations to their employees," approved June eleventh, nineteen hundred and six.

AMENDMENT, ACT OF APRIL 5, 1910, CH. 143, 36 STAT. L. 291.

§ 1. (Liability of railroad common carriers to employees—Time limit of actions—Jurisdiction—Concurrent jurisdiction of state courts.) That an act entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April twenty-second, nineteen hundred and eight, be amended in section six so that said section shall read:

§ 6. That no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued.

Under this act an action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

§ 2. (Survival of actions in case of death.) That said Act be further amended by adding the following section as section nine of said act:

§ 9. That any right of action given by this Act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

CHAPTER IV

Nature and Scope of Act.

B. Reason, Purpose and General Nature of Act.—By this act congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce.[24] The underlying reason for the act, as well as the general object sought to be accomplished thereby, is plain upon its face. The reasoning of the cases in which the fellow-servant rule has been laid down by the courts has, in view of modern methods and conditions, lost much, and in some cases all, of its force, and in at least one case decided under these acts the rule as well as the reason upon which it is based, has been pronounced archaic.[25] The rules as to assumption of risk and contributory negligence, as applied by the courts, in view of modern conditions surrounding those engaged in certain occupations, are manifestly harsh, cruel, and unjust, and ought long since in the furtherance of justice and the interest of humanity to have been greatly modified. And in view of the well-known fact, of which congress and the courts take constant notice, that the great employers of labor and their employees do not stand upon an equality, and that as a class the great proprietors are in a position to prescribe terms and lay down rules which laborers are practically constrained to obey, there are certainly substantial reasons why employers engaged in certain occupations should not be permitted to relieve themselves by any contract, rule or regulation from liability for injuries caused by their negligence or by the negligence of their other employees.[26]

It is plain, therefore, that the present act reflects, and is in har-

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24. Reason, purpose, and general nature of act.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

25. Same.—Snead *v.* Central, etc., R. Co. (C. C.), 151 Fed. 608; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

26. Same.—Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211; Fulgham *v.* Midland Val. R. Co. (C. C.), 167 Fed 660.

mony with, what may be said to be the strong trend of the public mind in nearly all civilized countries at this time, and to quote the language of Judge Rogers in a case which arose in the Federal Circuit Court for the Western District of Arkansas: "It proceeds on the theory that the railroad corporations are quasi public corporations, and that the railroad company in the first place, and the public in its final analysis, should be insurers of the lives and persons of its employees while engaged in interstate commerce, for if the railroad companies are to be the insurers of their employees they must in the end be reimbursed also by their customers for whom they do the carrying business, and in its last analysis their customers are simply the public. The theory of this legislation is that the public should share the misfortunes of the families of those who are injured or killed in the quasi public business in which railroads are engaged. So it is provided, in substance, where the employee is injured in the service of a railroad while engaging in interstate commerce, he shall have a cause of action for that injury, and this action he can maintain in his own name, although he may have by his own negligence contributed to the injury; but the damages in such case shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Here the common-law doctrine of contributory negligence is abrogated in the interest of the employee and the doctrine of comparative negligence substituted, which, pro tanto, encourages care and diligence upon the part of the employee."[27]

The Act of 1906 was held to be unconstitutional by the Supreme Court in an opinion filed on January 6, 1908, on the ground that it attempted a regulation of the liability of interstate carriers for injuries to their employees not only while engaged in interstate commerce, but attempted also to prescribe the rules governing the liability of such carriers as to all their employees, intrastate as well as interstate, and regardless of whether engaged in interstate commerce at the time of the

27. Same.—Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660, 663. See, also, Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

injury or not.[28] In holding the act invalid, however, the court anticipated the possible objection of the want of power in congress to legislate upon the subject under any circumstances, and intimated that congress had the power to enact such a regulation if restricted in its application to interstate carriers and their employees, and to injuries sustained while engaged in such commerce. On the 31st day of January, 1908, the President, in a special message to congress, called its attention to that decision and earnestly recommended the enactment of a statute to apply only to the class of cases upon which the court had decided it could constitutionally legislate, and congress being in session at the time, the present act was introduced, was carefully considered by the Judiciary Committee of the House, and thereafter enacted as a law at that session, and approved by the President on April 22, 1908, only a little more than three months after the Supreme Court had declared the former act unconstitutional.[29]

C. Scope of Act.—Unlike the former act, which embraced common carriers of every description, the present act applies only to carriers by railroad, while engaging in interstate or foreign commerce, and only to an employee "suffering injury while he is employed by such carrier in such commerce." In order to establish a cause of action under the act, therefore, the offending carrier at the time of the injury must have been engaged in interstate and foreign commerce, and the injury must have been suffered by the employee while employed by such carrier in such commerce. Both these facts must be present or the act does not apply—the carrier must be actually engaging in interstate commerce, and the employee must also be taking part therein. If, therefore, the business being done by the carrier is purely intrastate, and in the course of such business it injures an employee, the act does not apply. Neither does it apply, although the business being done by the carrier is commerce between the states,

28. **Same.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

29. **Same.**—Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942, 945.

if the injured employee is engaged in work that does not properly belong to such commerce.[30]

But as the present act was clearly passed to meet the objection of the decision in the first Employers' Liability Cases,[31] it was doubtless the purpose of congress to comprehend within its provisions the whole subject of the relations of common carriers by rail and their employees engaged in interstate commerce,[32] and it is held that it must be construed as including within the terms "every common carrier by railroad," and "person employed in such commerce," every carrier and every person whom congress could constitutionally include.[33] Hence, if the conditions above stated concur, namely, that the injury was sustained while the carrier was engaging in interstate commerce, and to an employee of such carrier while he was also engaged therein, the fact that the carrier and the employee were also engaged at the same time in intrastate commerce, using perhaps the same means and agencies for both, is immaterial.[34] And since the same man

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30. Scope of Act—Both carrier and employee must have been engaged in interstate commerce at time of injury.—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Lamphere *v.* Oregon R., etc., Co. (C. C.), 193 Fed. 248, reversed on application of this rule to facts in 196 Fed. 336; Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858, 859; Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737.

Under the terms of the first act, where a railroad company by which plaintiff was employed was an interstate carrier at the time plaintiff was injured, it was held that it was not material to plaintiff's right to the benefit of the act, that the train on which plaintiff was injured was an intrastate train. Hall *v.* Chicago, etc., R. Co. (C. C.), 149 Fed. 564.

31. The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

32. Same—Designed to include every carrier and every person whom congress could constitutionally include.—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1003.

33. Same—Same.—Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

34. Same—Same—Immaterial that carrier and employee were also engaged in intrastate commerce at time of injury.—Central R. Co.

may have duties including both interstate and intrastate commerce, it follows that the act will not necessarily apply to the same person in all the details of his employment, but that he will be subject to the act while engaged in the one and not in the other.[35] Whether in such case a cause of action arises under the act depends upon the circumstances existing at the time of the injury. If at the time of the injury, the employee was performing some service for the company in furtherance of its interstate commerce the rules of law declared in the Act of 1908, and its amendment, will apply. Upon the other hand, if the employee, when injured, is engaged wholly in the performance of a service in furtherance of the intrastate business of the railroad company, then the act of congress does not apply, because to give it application in such case would be extending the power of the federal government over matters exclusively within the state jurisdiction and control.[36]

Not Necessary That Carrier and Employee Should Have Been Engaged in Same Act.—The act apparently does not require that the carrier and the injured employee should both be engaged in the same act of interstate business. Commerce between the states has many divisions and subdivisions, and, if the carrier while engaged in doing one kind of interstate work should injure an employee who is engaged in doing another kind of such work, the remedy provided by the act appears to be available.[37]

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v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 903, affirming 180 Fed. 832; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

35. **Not applicable to same person in all details of his employment.**—Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, 837, affirmed in 113 C. C. A. 379, 192 Fed. 901.

36. **Same—Applicability of act dependent upon circumstances existing at time of injury.**—Van Brimmer *v.* Texas, etc., R. Co. (C. C.), 190 Fed. 394.

37. **Not necessary that carrier and employee should have been engaged in same act.**—Pedersen *v.* Delaware, etc., Railroad (C. C.), 184 Fed. 737, 739.

CHAPTER V

Modification of Existing Rules and Principles.

D. Principal Changes Made by Act.—Fellow Servant Rule Abolished.—This, of course, was one of the main objects, if not the principal object, of the act, it being twice provided that the cause of action given shall arise and the carrier be liable in damages "for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier."[38] It may be stated in this connection that in determining who are fellow servants within the meaning of the act, the federal courts follow the rule of the Federal Supreme Court, and not the doctrines of the state courts;[39] and that a railroad section foreman and the members of the crew working under him are fellow servants within the rule of the federal courts.[40] And where plaintiff, a track walker, was injured while assisting certain fellow employees in repairing a switch in a railroad yard by being struck by certain cars, kicked toward him, and from the relative position of plaintiff and his fellow employees the jury could have found that plaintiff was relying on them to look out for trains approaching from that di-

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38. Fellow-servant rule abolished.—See the Act of April 22, 1908, §§ 1, 2. See, also, Northern Pac. R. Co. *v.* Maerkl (C. C.), 198 Fed. 1, 6; Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 902, affirming 180 Fed. 832.

39. Fellow servants within meaning of act.—Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893, 895, citing Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, 13 S. Ct. 914.

40. Section foreman and members of train crew under him.—Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893, 895, citing Northern Pac. R. Co. *v.* Hambly, 154 U. S. 349, 33 L. Ed. 1009, 14 S. Ct. 983; Northern Pac. R. Co. *v.* Peterson, 162 U. S. 346, 40 L. Ed. 994, 16 S. Ct. 843; Northern Pac. R. Co. *v.* Charless, 162 U. S. 359, 40 L. Ed. 999, 16 S. Ct. 848; Martin *v.* Atchison, etc., R. Co., 166 U. S. 399, 41 L. Ed. 1051, 17 S. Ct. 603.

rection, their failure to warn him constituted negligence of fellow servants which, as provided by the act, gave a right of action against the railroad company.[41]

Doctrine of Contributory Negligence Modified.—By § 3 of the act it is provided that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." In other words, as to cases of this character, the defense of contributory negligence is wholly abolished;[42] while as to all other cases it is provided that "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[43] Under this latter part of the section, it is held that the fact that an employee's negligence is equal to or greater than that of the railroad com-

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41. **Negligence of fellow servants—What constitutes.**—Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

42. **Doctrine of contributory negligence modified.**—Where a railroad engineer was furnished with an engine equipped with a water glass without any shield or guard, and on his return from his first trip applied to his foreman for a shield or guard, and was informed that defendant had none, and plaintiff was injured by the explosion thereof on another trip, defendant was negligent, and any contributory negligence of plaintiff was no defense under the act of April 22, 1908. Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 72 S. E. 958.

It has also been held that in an action for injuries to a trackman in a railroad yard, by being struck by certain passenger cars, kicked along the track, contributory negligence is no defense. Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed in 113 C. C. A. 379, 192 Fed. 901.

43. **Same—Proportionate diminution of damages.**—See the Act of 1908, § 3. See, also, Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211, 213; Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, 902, affirming 180 Fed. 832; Johnson *v.* Great Northern R. Co. (C. C. A.), 178 Fed. 643, 648.

pany will not bar a recovery of any damages,[44] and that if the cause of action is established by showing that the injury resulted in whole or in part from the defendant railway company's negligence, the statute can not be nullified and the right of recovery defeated by calling the plaintiff's act the proximate cause of the injury; that the plaintiff's negligent act or omission, by whatever name it may be called, is the same act or omission, and that it is only when such act or omission on the part of the plaintiff is the sole cause—when the defendant's act is no part of the causation—that the defendant is free from liability under the act.[45] Manifestly, therefore, to give effect to the act in such a case it is essential that the relative amounts of damages caused by the negligence of the respective parties must be determined. In the case of injury resulting in death, therefore, the jury should first find the amount of damages to which the decedent's next of kin would have been entitled in the absence of any contributory negligence on his part; and they should then abate that sum by the amount which they shall find represented the decedent's proportionate contributory negligence.[46]

By the act, the question of contributory negligence, when applicable, is one of fact, to be submitted to the jury.[47]

Provision as to Assumption of Risk.—By § 4 of the Act of 1908, it is provided that: "In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the viola-

44. **Same—Same—Where employee's negligence equal to or greater than that of defendant.**—Louisville, etc., R. Co. *v.* Wene (C. C.), 202 Fed. 887.

45. **Same—Same—Doctrine of proximate cause not to be applied, when.**—Grand Trunk Western R. Co. *v.* Lindsay (C. C.), 201 Fed. 836; Louisville, etc., R. Co. *v.* Wene (C. C.), 202 Fed. 887, 892.

46. **Same—Same—How jury to proceed in diminishing damages.**—Louisville, etc., R. Co. *v.* Wene (C. C.), 202 Fed. 887, 891.

47. **Contributory negligence a question for the jury.**—Johnson *v.* Great Northern R. Co. (C. C.), 178 Fed. 643, 648; Sandidge *v.* Atchison, etc., R. Co. (C. C.), 193 Fed. 867.

tion by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." It thus appears that under the federal statute a complaining employee to whom the act applies is not relieved from the operation of the ordinary rule of assumed risk, except in cases where there is a violation by the carrier of some statute enacted for the safety of an employee and which violation has contributed to his injury or death.[48]

This section is controlling with respect to any different or contrary state rule, in cases in which the federal act applies, whether such state rule be common law or statutory.[49]

And upon well-settled principles it has been held that the fact that an employee may have assumed the risk from one of two contributing causes of an injury will not defeat his right to recover, where the other cause is one for which the master is liable.[50] Thus, where one of the proximate causes of the injury was

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48. **Provision as to assumption of risk.**—Freeman *v.* Powell (Tex. Civ. App.), 144 S. W. 1033, 1034, affirmed, no op. See, also, Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, 835, affirmed in 113 C. C. A. 379, 192 Fed. 901.

Where a railroad company was moving a car in interstate commerce which had a coupler so defective that it would not couple automatically by impact, as required by the Act of March 2, 1893, c. 196, § 2, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), and an employee, while attempting to remedy the defect in the performance of his duty, was caught between the cars and injured, the violation of the statute by the company was a contributing cause of the injury, which rendered it liable therefor; the questions of assumption of risk and contributory negligence being immaterial, under §§ 3 and 4 of the act. Johnson *v.* Great Northern R. Co. (C. C. A.), 178 Fed. 643.

Under the Act of 1906, where plaintiff was injured while operating an unboxed saw in the car shops of defendant, an interstate railway company, by which he was employed, it was held that he did not assume the risk by voluntarily accepting employment in the shop, although the danger was obvious. Malloy *v.* Northern Pac. R. Co. (C. C.), 151 Fed. 1019.

49. **Same—Supersedes statutory or common law rule existing in state.**—Freeman *v.* Powell (Tex. Civ. App.), 144 S. W. 1033, affirmed, no op.

50. **Same—Where employee assumes risk of one of two contributing causes.**—Northern Pac. R. Co. *v.* Maerkl (C. C.), 198 Fed. 1.

the negligence of a fellow servant of the deceased, it was held that since under the act such defense was no longer available to the defendant company, it was immaterial whether the deceased had assumed the risk of the defendant's negligence in failing to see that the flooring was properly fastened to the center sills, since the law is that it is only necessary for the plaintiff to show that one of the co-operating causes of the injury was a negligent act or omission for which the master is responsible.[51]

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51. **Same—Same.**—Northern Pac. R. Co. *v.* Maerkl (C. C.), 198 Fed. 1, 6, citing Kreig *v.* Westinghouse & Co., 214 U. S. 249, 53 L. Ed. 984; 29 S. Ct. 619; Standard Oil Co. *v.* Brown, 218 U. S. 78, 54 L. Ed. 939, 30 S. Ct. 669; Deserant *v.* Cerillos Coal R. Co., 178 U. S. 409, 44 L. Ed. 1127, 20 S. Ct. 967; Morgan *v.* Robinson, 157 Cal. 348, 107 Pac. 695; Seaboard Air Line *v.* Witt, 4 Ga. App. 149, 60 S. E. 1012; Labatt on Master & Servant, § 813.

CHAPTER VI

Constitutionality.

E. Constitutionality of Act.—Generally.—From the standpoint of power in congress under the interstate commerce clause of the constitution to deal with the relation of master and servant as between those carriers engaged in interstate commerce and those of their employees engaged in the same commerce, and to regulate the liability of the former for personal injuries sustained by the latter while both are engaged in that commerce, there can be no question as to the entire constitutionality of the Act of April 22, 1908, since the authoritative utterance of the Federal Supreme Court in the Second Employers' Liability Cases.[1] Prior to this decision, the constitutionality of the act as a valid exercise of the power to regulate interstate commerce had been maintained by a number of decisions rendered in the lower federal courts, and in the state courts of last resort.[2] And even the first act of June 11, 1906, which was afterwards declared to be an unwarranted interference with intrastate commerce, was held by numerous decisions not to be obnoxious in this respect.[3]

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1. **Constitutionality of act, generally.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762.

2. **Same.**—State *v.* Chicago, etc., R. Co., 136 Wis. 407, 117 N. W. 686 (Sept. 29, 1908); Owens *v.* Chicago, etc., Ry. Co. (Minn.), 128 N. W. 1011; St. Louis, etc., R. Co. *v.* Conley, 110 C. C. A. 97, 187 Fed. 949; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 904; Walsh *v.* New York, etc., R. Co. (C. Ct. D. Mass. Oct. 26, 1909), 173 Fed. 494.

3. **Same—Act of June 11, 1906.**—The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 308, 28 S. Ct. 141; Snead *v.* Central of Ga. R. Co. (C. Ct. S. D. Ga., E. D. March 25, 1907), 151 Fed. 608; Spain *v.* St. Louis & S. F. R. Co. (C. Ct. E. D. Ark., E. D. March 13, 1907), 151 Fed. 522; Kelley *v.* Great Northern R. Co. (C. Ct. D. Minn. 5th Div. Mar. 11, 1907), 152 Fed. 211; Plummer *v.* Northern

As Encroaching upon State Powers, Regulating Intrastate Commerce, etc.—As repeatedly stated, the original act of June 11, 1906, was declared invalid in the first Employers' Liability Cases because not confined in its operation to interstate carriers and their employees while engaged in interstate commerce.[4] It is true that the opinion in that case was rendered by a greatly divided court. The division of opinion only extended, however, to the proper construction of the act, the majority being of the opinion that the act applied to all the employees and to the entire business of common carriers engaged in interstate transportation, even in part, and without regard to the nature of the business, as interstate or intrastate, which was being done at the time the injury was sustained; while the minority were of the opinion that, properly construed, the act did not embrace liability for any injuries other than those sustained by the employees of interstate carriers and while engaged in interstate commerce. But while the court was not united upon the proper

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Pac. R. Co. (C. Ct. W. D. Wash. N. D. Mar. 2, 1907), 152 Fed. 206; Lancer *v.* Anchor Line (Dist. Ct. S. D. N. Y. July 15, 1907), 155 Fed. 433.

Contra.—Howard *v.* Illinois, etc., R. Co. (C. Ct. W. D. Tenn. W. D. Jan. 1, 1907), 148 Fed. 997; Brooks *v.* Southern Pac. Co. (C. Ct. W. D. Ky. Dec. 31, 1906), 148 Fed. 986; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762.

4. **As a regulation of intrastate commerce—Encroachment upon state powers; Act of June 11, 1906.**—Employers' Liability Cases, 207 U. S. 463, 53 L. Ed. 297, 28 S. Ct. 141.

Previous to this decision, the validity of the act, as not being obnoxious to the objection that it was an encroachment upon the domain of state powers and an attempt to regulate intrastate commerce, had been maintained by the following cases: Spain *v.* St. Louis & S. F. R. Co. (C. Ct. E. D. Ark., E. D. March 13, 1907), 151 Fed. 522; Snead *v.* Central of Ga. R. Co. (C. Ct. S. D. Ga., E. D. March 25, 1907), 151 Fed. 608; Plummer *v.* Northern Pac. R. Co., 152 Fed. 206; Kelley *v.* Great Northern Ry. Co., 152 Fed. 211.

Contra.—Brooks *v.* Southern Pac. Co. (C. Ct. W. D. Ky. Dec. 31, 1906), 148 Fed. 986; Howard *v.* Illinois, etc., R. Co. (C. Ct. W. D. Tenn. W. D. Jan. 1, 1907), 148 Fed. 997; Atchison, etc., R. Co. *v.* Mills, 49 Tex. Civ. App. 349, 108 S. W. 480.

construction of the act, all the justices were united upon the proposition that, if the construction announced by the majority was correct, and if the act did apply to all common carriers whose business was interstate commerce in whole or in part, without regard to the nature of the business that was being done at the time the injury was sustained, the legislation would necessarily include intrastate business, and would therefore transcend the power of congress.[5] And while it was intimated in that case that the valid and invalid portions of the act were so interblended that the whole must fail, it was afterwards held that its invalidity, so far as interstate commerce was concerned, did not invalidate such of its provisions as attempted to regulate commerce within the District of Columbia and the territories.[6]

The present act of April 22, 1908, was drawn to meet the objection on which the first act was held to be invalid, and that it does not perpetuate the infirmities which rendered that act unconstitutional, but is a valid exercise of the power vested in congress, properly restricted to interstate carriers and their employees, and applicable only to those cases in which the employee was engaged in interstate commerce at the time the injury was sustained, is conclusively settled by the decision of the Federal Supreme Court in the Second Employers' Liability Cases.[7]

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5. **Same—Same—Same.**—Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; Pedersen *v.* Delaware, etc., R. Co. (C. C.), 184 Fed. 737, 738.

6. **Same—Same—As to commerce in the District of Columbia and the territories.**—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21. Contra: Atchison, etc., R. Co. *v.* Mills, 49 Tex. Civ. App. 349, 108 S. W. 480.

7. **Present act not invalid as attempting to regulate intrastate commerce.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

This decision reversed the decision of the Supreme Court of Errors of Connecticut in Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762, in which it was held that the act was unconstitutional, not only in that it attempted to regulate intrastate commerce, but upon the further ground that the whole subject was one outside the power conferred upon congress by the interstate commerce clause

It may be well to mention in this connection a point that has been fully gone into in a preceding part of this article, namely, that it is not a valid objection that the act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged therein, and the act is not to be invalidated because of this incidental and unavoidable effect upon intrastate transportation.[8] Neither is this act invalid because it results in establishing rules and measures of liability in cases to which it applies different from those which exist under the state laws in other cases arising from the relation of master and servant, nor because it gives the right of recovery, in case of the death of an employee,

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of the constitution; that the provision forbidding contracts, rules and regulations exempting carriers from the liabilities imposed by the act was opposed to the due process clause of the Fifth Amendment; and that the provisions with respect to the distribution of the damages recoverable, being inconsistent with the laws of the several states as to the devolution of the estates of deceased persons, was unconstitutional as an invasion of the right of the states to legislate upon that question and to prescribe the duties of executors and administrators.

Other cases sustaining the validity of the act on this point are as follows: Zikos *v.* Oregon, etc., R. Co. (C. C.), 179 Fed. 893; Pedersen *v.* Delaware, etc., R. Co. (C. Ct. E. D. Penn. Jan. 18, 1911), 184 Fed. 737, 738; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 842; Taylor *v.* Southern R. Co. (C. Ct. N. B. Ga. April 23, 1910), 178 Fed. 380, 382; Cain *v.* Southern R. Co. (C. C. E. D. Tenn. N. D. March 10, 1911), 199 Fed. 211.

8. Same—Where injury results from negligence of agency or employee engaged in intrastate commerce.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942. See, also, Zikos *v.* Oregon, R., etc., Co. (C. Ct. Wash. E. D. June 4, 1910), 179 Fed. 893, in which it was held that this point did not properly arise in the case, and that even if the statute should be held obnoxious in this respect, it was separable and valid in other respects.

to different parties; but in cases to which it applies it is paramount and governs in the state as well as federal courts.[9]

Nor can it be said that it involves an interference by congress with the distribution of an estate through the probate court of the state. The cause of action was created by congress in the exercise of its power to regulate commerce among the several states, and it is elementary that in doing so it might determine who was entitled to maintain the same and for whose benefit. The administrator is not required thereby to institute proceedings; he may do so, and in that event can recover only for the benefit of the person entitled under the act to the damages.[10]

As a Deprivation of Liberty or Property without Due Process of Law.—Long ago, in the Legal Tender Cases,[11] it was settled that the due process clause of the Fifth Amendment must be understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power, and that it does not inhibit, and has no bearing upon, laws that indirectly work harm and loss to individuals. Upon the same principle, it is held that neither the Act of June 11, 1906, nor the Act of April 22, 1908, is obnoxious to the due process clause of the Fifth Amendment, either in their general operation and effect,[12] or by reason of the effect of any special

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9. **Same—As establishing different rule and measure of liability from that existing under state law.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

10. **Same—As interfering with state powers with regard to distribution of estates.**—Bradbury *v.* Chicago, R. I. & P. Ry. Co. (Iowa), 128 N. W. 1, 5.

11. 12 Wall. 457, 549, 551, 20 L. Ed. 287.

12. **As a deprivation of liberty or property without due process of law.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 352, 73 Atl. 754); Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 948; Missouri Pacific R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161; Snead *v.* Central of Ga. R. Co. (C. Ct. S. D. Ga., E. D. March 25, 1907, 151 Fed. 608; St. Louis, I. M. & S. Ry.

provision, such as that prohibiting any contract, rule, regulation, or device exempting the railroad company from the liability created by the act, whether considered with reference to future or existing contracts, rules and regulations,[13] or by reason of the changes made in the existing rules of law with respect to fellow servants, contributory negligence, assumption of risk and the right to recover where the injury results in death, since there can, generally speaking, be no property or vested right in any rule of the common law.[14]

Equal Protection of the Laws—Arbitrary Classification.—In answering the contention that the Act of April 22, 1908, makes an unreasonable and arbitrary discrimination and operates to deny the equal protection of the law, it might have been sufficient for the court to have simply stated that the equal protection clause, upon which such objection was based, is found only in the Fourteenth Amendment, and is, in its terms, and by

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Co. *v.* Conley, 110 C. C. A. 97, 187 Fed. 949; The Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141, affirming 148 Fed. 986, 997.

13. **Same—Provision prohibiting contract, rule, regulation or device intended to defeat operation of act.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 373, 73 Atl. 754, 762, and affirming 173 Fed. 494); Philadelphia, etc., R. Co. *v.* Shubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589; Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432, 434; Malloy *v.* Northern Pac. R. Co. (C. C.), 151 Fed. 1019, 1020; Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942, 948; St. Louis, etc., R. Co. *v.* Conley, 110 C. C. A. 97, 187 Fed. 949.

The contention that the act violates the Fifth, Seventh, Tenth, and Fourteenth Amendments of the constitution is without merit. Kelley *v.* Great Northern R. Co. (C. Ct. D. Minn. 5th Div. Mar. 11, 1907), 152 Fed. 211.

14. **Same—Provisions changing rules of law as to fellow servants, contributory negligence, and assumption of risk.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 352, 73 Atl. 754); Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 948, citing Wilmington Mining Co. *v.* Fulton, 205 U. S. 60, 74, 51 L. Ed. 708, 27 S. Ct. 412, 417.

the uniform decisions of the Federal Supreme Court, prohibitive of state action only; but without resting its decision upon that ground, the court has held that the imposition of the liability created by the Act of April 22, 1908, upon interstate carriers by railroad only, and for the benefit of all their employees engaged in interstate commerce, although some are not subjected to the peculiar hazards incident to the operation of trains, or to hazards that differ from those to which other employees in such commerce, not within the act, are exposed, does not invalidate the act as making an arbitrary and unreasonable discrimination, even though it should be conceded, which is not decided, that the principle embodied in the due process of law guaranteed by the Fifth Amendment is broad enough to include, and extends to the prohibition of, any arbitrary classification or discrimination amounting to a denial of the equal protection of the laws.[15]

Rights, Privileges and Immunities of Citizenship.—The same observation might be made with regard to the contention that the act is in violation of the principle expressed in that clause of the Fourteenth Amendment which provides that

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15. **Equal protection of the laws—Arbitrary classification.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494.

To the same effect, see Missouri, etc., R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161; Minneapolis, etc., Ry. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109, 8 S. Ct. 1176; Chicago, etc., R. R. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, 15 S. Ct. 585; Employers' Liability Cases, 207 U. S. 503, 52 L. Ed. 297, 28 S. Ct. 141; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 904; Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 946.

A statute abolishing the fellow-servant rule, limiting its application to carriers by rail, is neither an arbitrary nor unreasonable classification. Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 947. Missouri Pacific Ry. Co. *v.* Mackey, 127 U. S. 206, 32 L. Ed. 107, 8 S. Ct. 1161; Minneapolis, etc., R. R. Co. *v.* Herrick, 127 U. S. 210, 32 L. Ed. 109, 8 S. Ct. 1176; Chicago, etc., R. R. Co. *v.* Pontius, 157 U. S. 209, 39 L. Ed. 675, 15 S. Ct. 585; Tullis *v.* Lake Erie & Western R. R. Co., 175 U S. 348, 351, 44 L. Ed. 192, 20 S. Ct. 136; St. Louis, etc., R. R. Co. *v.* Callahan, 194 U. S. 628, 48 L. Ed. 1157, 24 S. Ct. 857.

no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Besides, the privileges and immunities clause of the Fourteenth Amendment, as is well settled, only applies to those privileges and immunities "which arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the constitution of the United States," and not to those fundamental rights which are inherent in and belong to all who live under a free government. These latter privileges are "inherent in state citizenship, and are privileges or immunities of that citizenship only."[16] This question was very learnedly discussed in the case of Twining *v.* New Jersey, in which Mr. Justice Moody analytically reviews the previous decisions of the Supreme Court on that subject.[17]

Who May Raise Constitutional Questions.—Under the old act of June 11, 1906, where the plaintiff alleged that he was engaged at the time of the accident on a train engaged in interstate commerce, it was held that he was within the general rule of law that courts will not listen to an objection going to the constitutionality of an act by a party whose rights it does not affect in the particular case on trial.[18]

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16. **Rights, privileges, and immunities of citizenship.**—Watson *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. June, 1909), 169 Fed. 942, 946.

17. **Same.**—Twining *v.* New Jersey, 211 U. S. 78, 97, 53 L. Ed. 97, 29 S. Ct. 14.

18. **Who may raise constitutional questions.**—Spain *v.* St. Louis, & S. F. R. Co. (C. Ct. E. D. Ark., E. D. March 13, 1907), 151 Fed. 522.

CHAPTER VII

Construction of Act.

F. Construction of Act.—By What Courts Construed.—The decision of the United States' Supreme Court upon the proper interpretation, construction, and effect of statutes regulating or affecting interstate and foreign commerce is conclusive upon all other tribunals when the same matters are called in question.[19]

Penal or Remedial—Strict or Liberal.—According to decisions rendered in several of the federal courts, the Act of April 22, 1908, particularly the first section thereof, being in derogation of the common law, is to be confined to its plain meaning; in other words, it is to be strictly construed, though not so strictly as to defeat the obvious intention of congress as found in the language actually used according to its true and obvious meaning.[20] Other courts, taking a more liberal view, hold that the act, while in derogation of the common law, is remedial and not penal in character, and should be liberally construed so as to prevent the mischief and advance the remedy.[21] This was the view taken of the earlier act in several decisions rendered thereunder,[22] and beyond question it is supported by the better rea-

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19. **Construction of act—By what courts construed.**—Rich *v.* St. Louis, etc., R. Co. (St. Louis Ct. App. Mo., July 2, 1912), 148 S. W. 1011, 1015.

20. **Same—Penal or remedial—Strict or liberal.**—Pedersen *v.* Delaware, L. & W. R. R. (C. Ct. E. D. Penn., Jan. 18, 1911), 184 Fed. 737, 739; Fulgham *v.* Midland Valley R. Co. (C. Ct. W. D. Ark. Ft. Smith Div., Feb. 19, 1909), 167 Fed. 660, 662, citing Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158.

21. **Same—Same.**—St. Louis, etc., R. Co. *v.* Conley (C. C. A.), 187 Fed. 949; Behrens *v.* Illinois, etc., R. Co., 192 Fed. 581.

22. **Same—Same.**—Spain *v.* St. Louis, etc., R. Co. (C. Ct. E. D. Ark. E. D. March 13, 1907), 151 Fed. 522, 529, citing Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 49 L. Ed. 363, 25 S. Ct. 158; Kelley *v.* Great Northern R. Co. (C. Ct. D. Minn. 5th Div. Mar. 11, 1907), 152 Fed.

son, for while the act undoubtedly is in derogation of the common law, yet, as stated in one case, the elimination of the doctrine of fellow servants and the modification of the doctrines of contributory negligence and assumption of risk certainly makes for the betterment of human rights as opposed to those of property, and in the light of modern thought and opinion, the law should be as broadly and as liberally construed as possible.[23] As we shall hereafter see, the act has been broadly construed, so as to include within the scope of its operation every person whom congress could constitutionally include.[24]

Construction on Questions of Fellow Servants, Assumption of Risk, etc.—In determining who are fellow servants within the meaning of the act, the federal courts follow the rule of the Federal Supreme Court, and not the doctrines of the state courts.[25] Likewise, the question whether the injured employee assumed the risk is to be determined by construction of the whole statute under the rules laid down by the Federal Supreme Court.[26]

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211 (distinguishing the Trade Mark Cases, 100 U. S. 82, 25 L. Ed. 550, and Illinois, etc., R. Co. *v.* McKendall, 203 U. S. 514, 51 L. Ed. 298, 27 S. Ct. 153).

23. Same—Same.—Behrens *v.* Illinois, etc., R. Co. (Dist. Ct. E. D. La. Dec. 30, 1911), 192 Fed. 581, 582.

24. Includes all persons whom congress could constitutionally include.—See post, "When Railroad or Employee Engaged in Interstate Commerce," III, G, 4, p. 67.

25. Construction on questions of fellow servants, assumption of risk, etc.—Zikos *v.* Oregon, etc., Nav. Co. (C. C.), 179 Fed. 893, 895, citing Baltimore, etc., R. Co. *v.* Baugh, 149 U. S. 368, 37 L. Ed. 772, 13 S. Ct. 914.

26. Same.—Horton *v.* Seaboard Line R. Co. (N. C.), 78 S. E. 494.

CHAPTER VIII

Operation of Act.

G. Operation of Act—1. Prospective or Retroactive.—While there are exceptions, especially in the case of remedial statutes, the general rule is that statutes are addressed to the future and not to the past; and, in the absence of explicit words to that effect, statutes are not retroactive in their application.[27] As the Act of 1908 introduced a new policy and radically changed the existing law, permitting a recovery in cases where a recovery could not have been had before, and taking away defenses which theretofore were available, the courts hold that it is prospective only in its operation, and that the phrase "action hereafter brought," as used in § 3, does not apply to an alleged cause of action which accrued, if at all, before the statute was enacted.[28] The decisions rendered under the Act of June 11, 1906, were to the same effect.[29]

2. Exclusive or Controlling Operation of Federal Act; Superseding State Law.—As to Carriers and Employees While Engaged in Interstate Commerce.—The laws of the several states are determinative of the liability of employees engaged in interstate commerce for injuries received by their employees while engaged in such commerce so long as congress, although empowered to regulate that subject, has not

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27. Operation—Prospective or retroactive.—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. 273, affirming 173 Fed. 65.

28. Same.—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. 273, affirming (C. C. A.), 173 Fed. 65, which affirmed 164 Fed. 698; Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852.

29. Same—Same—Decisions under Act of June 11, 1906.—Hall *v.* Chicago, etc., R. Co. (Cir. Ct. N. D. Iowa, Cedar Rapids Div. Dec. 19, 1906), 149 Fed. 564; Plummer *v.* Northern Pac. R. (C. Ct. W. D. Wash. W. D. Mar. 2, 1907), 152 Fed. 206.

acted thereon, because the subject is one which falls within the police power of the states in the absence of action by congress.[30] The inaction of congress, however, in nowise affects its power over the subject, and where congress has acted, the laws of the states, in so far as they cover the same field, are superseded, since that which is not supreme must yield to that which is.[31] And what is true of the states applies with even stronger reason, of course, to territorial legislation, over which congress has direct control,[32] and to regulations based upon the common law as well as to those based upon statutes. Both are rules of conduct proceeding from the supreme power of the state, and the fact that one is unwritten and the other written can make no difference in their validity or effect.[33]

Applying these principles to the case in hand, the decided cases establish the proposition that actions by employees against railroad companies to recover for personal injuries sustained when both parties were engaged in interstate commerce at the

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30. Exclusive operation of federal act—Power of states in absence of congressional regulation.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606, 608; Chicago, M. & St. P. R. Co. *v.* Solan, 169 U. S. 133, 42 L. Ed. 688, 18 S. Ct. 289; Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126, 1128; Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App.), 149 S. W. 1188; Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841.

31. Same—Powers of congress not affected by its inaction.—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Geer (Civ. App. Dallas, June 22, 1912, rehearing denied Oct. 12, 1912), 149 S. W. 1178, 1180.

32. Same—As to territorial legislation.—El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 271; Cound *v.* Atchinson, etc., R. Co. (C. C.), 173 Fed. 527.

33. Same—Immaterial whether regulation based upon common law or statute.—Western Union Tel. Co. *v.* Commercial Milling Co., 218 U. S. 406, 54 L. Ed. 1088, 31 S. Ct. 59, affirming 151 Mich. 425, 115 N. W. 698; Cound *v.* Atchison, etc., R. Co. (C. C.), 173 Fed. 527.

time of the injury are governed by the Federal Employers' Liability Act of April 22, 1908, and that said act supersedes all other laws as to actions for injuries so sustained, and is controlling as to the character of the action, the party plaintiff, the jurisdiction in which it may be brought, the elements and measure of damages, and the persons entitled to the benefit of any sums that may be recovered. In short, as to injuries sustained by the employees of railroads engaged in interstate commerce, where both are engaged in such commerce at the time the injury is sustained, this act overlaps and covers all state and territorial legislation, as well as regulations based upon the common law, and is therefore exclusive.[34] Once conceded that the federal statute

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34. Same—All state and territorial legislation superseded by Act of April 22, 1908.—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, 57 L. Ed. 651, 652, 33 S. Ct. 651; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874; American R. Co. *v.* Didricksen, 227 U. S. 145, 33 S. Ct. 224, 225; Michigan, etc., R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192; Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135; Bottoms *v.* St. Louis & S. F. R. Co. (Cir. Ct. N. D. Ga. May 3, 1910), 179 Fed. 318; Kansas City, etc., R. Co. *v.* Pope (Tex. Civ. App.) [Nov. 9th 1912, rehearing denied Dec. 14, 1912], 152 S. W. 185; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App.), 149 S. W. 841; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Walsh *v.* New York, etc., R. Co., 173 Fed. 494; Melzner *v.* Northern Pac. R. Co. (Sup. Ct. Mont.), 127 Pac. 1002; Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. Dist. Wash.), 196 Fed. 432; American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1, 5; Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La. Jan. 24, 1910), 176 Fed. 130; Fulgham *v.* Midland Valley R. Co. (C. Ct. W. D. Ark. Ft. Smith Div. Feb. 19, 1909), 167 Fed. 660; Taylor *v.* Southern R. Co. (C. Ct. N. D. Ga. April 23, 1910), 178 Fed. 380; Cound *v.* Atchison, etc., R. Co. (C. C.), 173 Fed. 527, 531; Dewberry *v.* Southern R. Co. (C. Ct. N. D. Ga. Jan. 8, 1910), 175 Fed. 307; Rich *v.* St. Louis, etc., R. Co. (St. Louis Ct. App. Mo. July 2, 1912), 148 S. W. 1011; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762.

Act held to apply to Porto Rico.—That the Employer's Liability Act of April 22, 1908, does apply to Porto Rico, is plain, since, on its face, it extends to the District of Columbia, the territories, the Panama Canal Zone, and other "possessions" of the United States. That it does extend to Porto Rico was expressly decided in Ameri-

is applicable, the state law is excluded by reason of the supremacy of the former under the national constitution.[35]

The fact that the state statute was enacted prior to the federal act and at a time when congress had not acted on the subject is not material, since, as stated, the power of congress over the subject is in no wise affected by its inaction.[36] And in a case arising under the Hours of Service Act (Act March 4, 1907, c. 2939, 34 Stat. 1415, U. S. Comp. Stat., Supp. 1909, p. 1170) it was held that this principle operated to preclude the state, during the period between the date of that act and the time when, by its express terms, it should go into effect, from making or enforcing as to employees engaged in interstate commerce, or upon a train engaged in moving both interstate and intrastate traffic, a local regulation limiting hours of labor.[37] But the intention of congress to take control of the subject so as to invalidate existing state statutory regulations could not be inferred from the enactment of the Act of June 11, 1906, since that statute, having been held to be an invalid exercise of the power of congress, was not a law for any purpose, but was as inoperative as if it had never been passed, and could neither confer a right or immunity nor operate to supersede any existing valid law.[38]

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can R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603, and American R. Co. *v.* Didricksen, 227 U. S. 145, 33 S. Ct. 224, 225.

The question as to whether the safety appliance act extended to that island was reserved in the Birch Case, but expressly decided in the affirmative in American R. Co. *v.* Didricksen, 227 U. S. 145, 33 S. Ct. 224, 225.

35. Same—Conceding applicability of federal act supersedes state law.—Second Employers' Liability Cases, 223 U. S. 1, 53, 56 L. Ed. 327, 347, 38 L. R. A. (N. S.) 44, 32 S. Ct. 169; Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59, 67, 57 L. Ed. 192, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Seale, 57 L. Ed. 651, 652, 33 S. Ct. 651; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874.

36. Immaterial that state law was enacted prior to federal act.—Rich *v.* St. Louis & S. F. R. Co., 148 S. W. 1011.

37. Power of state to enforce state law between time of enactment and time of taking effect of federal act.—Northern Pac. R. Co. *v.* Atkinson, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160, reversing 53 Wash. 673, 102 Pac. 876, 17 Am. Cas. 1013.

38. Same—Effect of Act of 1906, on legislative power of state.—

Since there has been some confusion of thought shown in the cases with regard to the precise effect of the federal law upon state and territorial enactments, it may be well to state, for the sake of accuracy, that the federal act does not operate to make state enactments void in the sense of rendering them unconstitutional. That is a term which would be applicable only in the event the states had no power to legislate upon this subject, even in the absence of congressional regulation. The true effect of the federal act, as specifically pointed out in several cases, is merely to suspend existing state legislation and render it inoperative during the time the federal act continues in force.[39] If, therefore, such federal act should be repealed, or should be declared unconstitutional, existing laws upon the statute books of the several states, which were not otherwise objectionable, would immediately become operative,[40] a result which was expressly

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Chicago, etc., R. Co. *v.* Hackett, 57 L. Ed. 581, distinguishing Northern Pac. Ry. Co. *v.* Washington, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160.

39. State legislation merely suspended, not rendered void, by operation of federal act.—Missouri, K. & T. Ry. Co. of Texas *v.* Saddler (Tex. Civ. App.), 149 S. W. 1188; Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126, 1128; Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606; Jones *v.* Chesapeake, etc., R. Co. (Ct. App. Ky.), 149 S. W. 951.

40. Same—Becomes operative upon repeal of federal act or decision declaring same unconstitutional.—Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App. Texarkana, June 1, 1911, rehearing denied June 29, 1911), 138 S. W. 1126, 1128; Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App. Dallas, June 29, 1912, rehearing denied Oct. 12, 1912), 149 S. W. 1188; Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606.

Speaking of the effect of the federal act upon state legislation, the Supreme Court said, in a recent case: "It therefore follows that in respect of state legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this act is paramount and exclusive, and must remain so until congress shall again remit the subject to the reserved police power of the states." Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192, 194.

declared to have taken place with regard to a law of Nebraska[41] upon the rendering of the decision in the First Employers' Liability Cases,[42] holding the Federal Act of June 11, 1906, to be unconstitutional, the latter act being construed, of course, as never having existed for any purpose.[43]

The Arkansas Cases.—In two separate cases that went to the Supreme Court of Arkansas it was held that the federal act is not exclusive in its operation, and that plaintiffs suing for injuries of this kind may proceed under either the state or federal statute;[44] the court being of the opinion that the federal act was not exclusive in the first case for the reason that there was no federal statute requiring interstate carriers to block switches, frogs, and guard rails; it appearing that the deceased had come to his death through the failure of the defendant to block a frog or a guard rail.[45] In support of this ruling the court relied upon the case of Chicago, etc., R. Co. *v.* State, 86 Ark. 412, 111 S. W. 456, in which it was held that the Arkansas statute requiring railway companies to equip certain freight trains with at least three brakemen was not in conflict with nor superseded by any act of congress, which case was affirmed on writ of error to the Supreme Court of the United States in Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

In the second case, the action was brought by the personal representative of the deceased in the courts of Arkansas for death resulting from an injury sustained in Oklahoma by reason of a defective car in the freight train upon which deceased was

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41. **Same—Same.**—Laws Neb. 1907, p. 191, c. 48, § 1.

42. **Same—Same.**—207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

43. **Same—Same.**—Missouri, etc., R. Co. *v.* Castle (C. C. A.), 172 Fed. 841; Missouri, etc., R. Co. *v.* Castle, 224 U. S. 541, 56 L. Ed. 875, 32 S. Ct. 606, 608. See, also, Chicago, etc., R. Co. *v.* Hackett, 57 L. Ed. 581, distinguishing Northern Pac. R. Co. *v.* Washington, 222 U. S. 370, 56 L. Ed. 237, 32 S. Ct. 160.

44. **The Arkansas decisions.**—St. Louis, etc., R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

45. **Same.**—St. Louis, etc., R. Co. *v.* McNamare, 91 Ark. 515, 122 S. W. 102.

a brakeman, and the court, after comparing the Oklahoma statute and the federal act, and holding that there was no conflict, then proceeded, after noticing the great weight of decided authority to the contrary, particularly the case of Fulgham *v.* Midland Valley R. Co. (C. C. W. Dist. Ark.), 167 Fed. 660, to hold that the remedy given by the Federal Act of April 22, 1908, is not exclusive, and that the plaintiff was entitled to proceed under the state law.[46] This case was reversed on a writ of error to the Federal Supreme Court, that court reaffirming the proposition that the federal act supersedes state laws in the matters with which it deals, and holding that it deals with the liability of carriers while engaged in commerce between the states for defects in cars.[47]

In view of the fact that the same section of the act (§ 1) deals with injuries arising from defects and insufficiencies in the track and road bed, as well as in cars, there is no doubt that the decision in the first case[48] was also wrong, notwithstanding the principle announced in the case of Chicago, etc., R. Co. *v.* Arkansas, 219 U. S. 453, 55 L. Ed. 290, 31 S. Ct. 275.

As to Carriers and Employees While Engaged in Intrastate Commerce.—It is a well-settled principle that where the same instrumentality, as in the case of a railroad, is engaged in both intrastate and interstate transportation, it is subject to both state and federal regulation, and that the full control of each over the commerce subject to its dominion must be preserved.[49] It follows, therefore, that the Federal Employers' Liability Act of April 22, 1908, does not and could not supersede similar legislation by the states so long as the latter is made applicable only

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46. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

47. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 704, 33 S. Ct. 703.

48. Same.—St. Louis, etc., R. Co. *v.* McNamara, 91 Ark. 515, 122 S. W. 122.

49. As to carriers and employees while engaged in intrastate commerce.—Missouri, etc., R. Co. *v.* Larabee Flour Mills Co., 211 U. S. 612, 620, 53 L. Ed. 352, 29 S. Ct. 214; Employers' Liability Cases, 207 U. S. 463, 52 L. Ed. 297, 28 S. Ct. 141.

to injuries sustained while the employee was engaging solely in intrastate commerce, and that in such cases the action must be brought under the state law, whether statutory or the common law, and that all questions, such as proper parties plaintiff, the rules as to fellow servants, contributory negligence, and assumption of risk, the elements and measure of damages and the distribution of the same, will be determined by that law.[50]

Thus in Florida, where a right of action for wrongful death is given by statute, it was held under the Act of June 11, 1906, that an action might be brought to recover from a railroad company for the death of an employee occurring in that state in any case, and that whether the right of action was created by the state statute or by the Federal Employers' Liability Act (Act June 11, 1906, c. 3073, 34 Stat. 232 [U. S. Comp. St. Supp. 1907, p. 891]), was dependent upon whether the defendant was an interstate or wholly an intrastate carrier.[51] And in Texas where a railroad section hand was thrown from a hand car and injured as the car was being propelled at a high speed over the section, because of a low and defective joint in the track, plaintiff not being engaged in any sense in interstate commerce, it was held that the Texas act of April 13, 1909 (Gen. Laws Tex. [1st Ex. Sess.] 1909, c. 10), providing that in case a railroad employee is injured by a defect in the track, among other things, contributory negligence shall not be an absolute defense, was applicable.[52] And where, in an action for injuries to a brakeman, plaintiff alleged that defendant owned and operated various lines of railroad, all within the state, and that when plaintiff was injured his run was between

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50. Actions upon injuries arising in intrastate commerce determined by state law.—Hall *v.* Louisville, etc., R. Co. (C. C. N. Dist. Fla.), 157 Fed. 464; Missouri, etc., R. Co. *v.* Hawley (Tex. Civ. App.), 123 S. W. 726; Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App.), 138 S. W. 1126; Missouri, etc., R. Co. *v.* Sadler (Tex. Civ. App.), 149 S. W. 1188, 1192; Jones *v.* Chesapeake, etc., R. Co. (Ct. App. Ky.), 149 S. W. 951; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086.

51. Same.—Hall *v.* Louisville & N. R. Co. (Cir. Ct., N. D. Fla. Nov. 23, 1907), 157 Fed. 464.

52. Same.—Missouri, etc., R. Co. *v.* Turner (Tex. Civ. App. Texarkana, June 1, 1911, rehearing denied June 29, 1911), 138 S. W. 1126.

two terminal cities, and that the car from which he fell was being transported between such terminals, it was held that it sufficiently showed that defendant was then engaged in intrastate commerce only, and that his cause of action was governed by state laws, and not by the Federal Employers' Liability Act of April 22, 1908.[53]

Right to Recover under Either State or Federal Law—Pleading and Proof.—The federal courts are presumed to be cognizant, without pleading, of the Employers' Liability Act of April 22, 1908, and to know that, with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject.[54] Therefore in stating that the action must be brought and recovery had under the state law where the injury occurs in intrastate commerce, or under the federal act where the injury occurs in interstate commerce, it is not meant to say that the plaintiff must specifically plead or refer to the state statute in the one case, or to the federal act in the other, for, as we shall presently see, the proper procedure is to plead the facts, and a recovery may then be had according as the evidence may develop a case under the one law or the other.[55]

But a reference to a state statute in the petition in an action which can legally rest only upon the Employers' Liability Act will not invalidate the pleading any more than would the men-

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53. Same.—Missouri, K. & T. Ry. Co. of Tex. *v.* Hawley (Ct. Civ. App. of Tex. Dec. 4, 1909), 123 S. W. 726. See, also, Missouri, etc., R. Co. *v.* Saddler (Tex. Civ. App.), 149 S. W. 1188, 1192; Railway Co. *v.* Neaves (Tex. Civ. App.), 127 S. W. 1090.

54. Right to recover under either state or federal law—Judicial notice of statute.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135.

55. Same—Unnecessary to plead the statute—Plaintiff to plead the facts.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135; Ullrich *v.* New York, etc., R. Co. (D. C.), 193 Fed. 768; Jones *v.* Chesapeake, etc., R. Co. (Ct. App. Ky.), 149 S. W. 951, 953; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

tion of any other repealed statute.[56] If therefore, the plaintiff should specifically, but erroneously, base his action upon a state law which, under principles heretofore stated, must be regarded as superseded by the federal act, the court may treat as surplusage, and disregard, all reference to the state law, and if it should then appear, that, omitting all reference to the state law, and treating it as surplusage, the plaintiff has set forth facts showing a substantial cause of action under the controlling law, that is, under the federal act, and that the evidence is sufficient to support the same, the court may then administer the law as the court knows it to be, and render judgment under and in accordance with the federal act;[57] or it may permit the plaintiff to amend his pleading so as to bring himself within the act.[58]

Thus in the Georgia case cited, the action was brought in the Georgia courts upon a cause of action arising in Alabama, and the plaintiff specifically based his case upon the Alabama statute, it otherwise appearing, however, from the petition, and afterwards from the evidence, that the injury was sustained while the employee was engaging in interstate commerce, and that the case was therefore controlled by the federal act. The defendant attempted to interpose this objection in an amendment to its answer, which amendment was ruled out on the ground that it was in substance and effect a dilatory plea, going not to the merits of the action, but merely seeking to show that the plaintiff's right to recover was dependent, not upon the statute set forth, but upon another statute, namely, the Federal Employers' Liability Act, and should therefore have been offered at the appearance term of the court. In this, the Court of Appeals held that there was no error, or none of which the defendant could complain,

56. Same—Effect of erroneous plea or reference.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089.

57. Same—Same—Court to give judgment under state or federal law as case may warrant.—Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089; Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

58. Same—Same—Court may permit amendment.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

since the Alabama statute was more favorable to it than the federal act, and that since the petition was sufficient, after omitting as surplusage all reference to the Alabama statute, to make out a case under the federal act, and the evidence being plainly sufficient to demand a verdict for the plaintiff under that act, it was the duty of the judge to administer the law in accordance therewith, and that there was no error in submitting the case and rendering judgment for the plaintiff as though the action had been specifically brought under the federal act.[59]

The thing which can not be done is to award judgment under and in accordance with the principles of the state law where the evidence, as developed at the trial, shows that the cause of action arose in interstate commerce. This is what the Arkansas court attempted to do in the Hesterly Case, which was reversed on writ of error to the Federal Supreme Court.[60]

Complications arising in such cases out of the fact that the statute under which the action should have been brought required that the plaintiff should have sued in a different capacity, or that the action should have been brought by a different party plaintiff or for the benefit of different persons, will be discussed hereafter.[61]

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59. Same—Same—When objection treated as dilatory plea—Time of filing.—Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089. See, also, St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. Sheets, 57 L. Ed. 651, 33 S. Ct. 651; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. Sheets, 57 L. Ed. 703, 33 S. Ct. 703. And see post, "Plea or Answer," III, H, 7, p. 132.

60. No recovery under state law where evidence shows case arising in interstate commerce.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. Sheets, 57 L. Ed. 703, 704, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874. See, also, St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. Sheets, 57 L. Ed. 651, 653.

61. Where plaintiff sues in wrong capacity, or action brought by wrong person.—See post, "To Whom Given," III, H, 1, b, p. 93; "For Whose Benefit," III, H, 1, c, p. 105; "Party Plaintiff," III, H, 5, p. 124.

CHAPTER IX

Agreements Waiving or Defeating Operation of Act.

3. Contract, Stipulation, or Device Intended to Defeat Operation of Statute.—Section 5 of the Act of April 22, 1908, expressly provides that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void," with a proviso permitting the carrier to set off any sum of money, insurance or relief benefit it may have paid to the injured employee, or the person entitled thereto, on account of the injury or death for which the action is brought. This provision of the act has been variously attacked as being opposed to the due process clause of the Fifth Amendment, but there can be no question that the power to enact such legislation carries with it the power to prohibit any contract or device the purpose and intent of which is to waive, modify, evade, or in anywise thwart the purpose of the act by relieving the employer of his liability thereunder. This provision of the act is not unconstitutional, therefore, as infringing the liberty of contract guaranteed by the Fifth Amendment.[62]

And as applied to existing contracts, rules or regulations, the Supreme Court of the United States holds, with unanswerable logic, that the power of congress, in its regulation of interstate commerce, and of commerce in the District of Columbia and in the territories, to impose this liability, is not fettered by the necessity of maintaining existing arrangements and stipulations

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62. **Contract—Stipulation or device intended to defeat operation of statute—Constitutionality—Liberty of contract.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing 82 Conn. 373, 73 Atl. 762, and affirming 173 Fed. 494; Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589; Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash.), 196 Fed. 432, 434; Malloy *v.* Northern Pac. R. Co. (C. Ct. W. D. Wash), 151 Fed. 1019, 1020.

which would conflict with the execution of its policy; that to subordinate the exercise of the federal authority to the continuing operation of previous contracts would be to place, to that extent, the regulation of interstate commerce in the hands of private individuals, and to withdraw from the control of congress so much of the field as they might choose, by prophetic discernment, to bring within the range of their agreements; that the constitution recognizes no such limitation, and that it is of the essence of the delegated power of regulation that, within its sphere, congress should be able to establish uniform rules, immediately obligatory, which, as to future action, shall transcend all inconsistent provisions. Prior arrangements, therefore, are necessarily subject to this paramount authority.[63]

Not only is this principle to be deduced from the nature of the power itself, but it results also from the fact that the prohibition against the impairment of the obligation of contracts is not a restriction upon the powers of congress, and that the due process clause of the Fifth Amendment is held not to apply to incidental loss or injury arising from the operation of law, but only to those cases in which there is a direct taking or appropriation of property.[64] Existing as well as future contracts contravening the terms of this section fall under its condemnation, therefore, and must be held to have been entered into with the full knowledge and understanding that congress might at some future time so exercise the power vested in it as to render the same invalid.[65]

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63. Constitutionality as applied to existing contracts and arrangements.—Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

64. Same—Applicability of impairment clause—Incidental injuries not covered by Fifth Amendment.—Legal Tender Cases, 12 Wall. 457, 549, 551, 20 L. Ed. 287; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 (reversing 82 Conn. 373, 73 Atl. 754, 762); Watson *v.* St. Louis, etc., R. Co. (C. C. E. D. Ark.), 169 Fed. 942, 948; Missouri, etc., R. Co. *v.* Mackey, 127 U. S. 205, 32 L. Ed. 107, 8 S. Ct. 1161; Snead *v.* Central R. Co. (C. Ct. S. D. Ga.), 151 Fed. 608; St. Louis, etc., R. Co. *v.* Conley, 110 C. C. A. 97, 187 Fed. 949.

65. Same—Contracts made subject to future exercise of power by congress.—Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56

The same principle has been applied in the case of existing contracts contravening the prohibitions of the Interstate Commerce Act, as well as in other cases, and as the principle is a general one those cases are equally applicable here.[66]

This section of the act operates to prevent a railroad company from setting up as a defense a release of damages for injury or death, which release, independently of the statute, would be a full and complete defense to the action;[67] and also invalidates a stipulation in an existing contract of employment making the acceptance of benefits under a contract of membership in a railway relief department equivalent to a release of damages for the death or injury on account of which received.[68] It is held also to apply to implied as well as to express contracts and agreements, and any special defense predicated upon an implied contract of this character must fail.[69]

L. Ed. 911, 32 S. Ct. 589; Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

66. Principle general in its application—Interstate commerce cases.—Atlantic Coast Line R. Co. *v.* Riverside Mills, 219 U. S. 186, 55 L. Ed. 167, 31 S. Ct. 164, 31 L. R. A. (N. S.) 7; Baltimore, etc., R. Co. *v.* Interstate Commerce Commission, 221 U. S. 612, 55 L. Ed. 878, 31 S. Ct. 621; Louisville, etc., R. Co. *v.* Mottley, 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265; Chicago, etc., R. Co. *v.* McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259; Armour Packing Co. *v.* United States, 209 U. S. 56, 81, 52 L. Ed. 681, 28 S. Ct. 428; New York, etc., R. Co. *v.* United States, No. 2, 212 U. S. 500, 505, 53 L. Ed. 624, 29 S. Ct. 309; American Express Co. *v.* United States, 212 U. S. 522, 533, 53 L. Ed. 635, 29 S. Ct. 315; Legal Tender Cases, 12 Wall. 457, 549, 551, 20 L. Ed. 287.

67. Forbids setting up release of damages as a defense.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Fed. 432, 434.

68. Invalidates stipulation for release through acceptance of benefits.—Philadelphia, etc., R. Co. *v.* Schubert, 224 U. S. 603, 56 L. Ed. 911, 32 S. Ct. 589.

69. Applies to implied as well as express agreements.—Malloy *v.* Northern Pac. Ry. Co. (C. Ct. W. D. Wash. March 5, 1907), 151 Fed. 1019, 1020.

CHAPTER X

When Case Deemed to Be within the Federal Act.

4. When Railroad or Employee Engaged in Interstate Commerce.—In determining whether or not an employee was engaged in interstate commerce at the time of his injury most of the courts have proceeded upon the theory heretofore stated, namely, that the present act was drawn to obviate the defects which rendered the first act unconstitutional, and that it is to be construed so as to include within the scope of its operation every person whom congress could constitutionally include,[1] not forgetting, however, that the defendant railroad company and the injured employee must both have been engaged in interstate or foreign commerce at the time the injury was sustained.[2] It is not essential, however, that the agency or employee inflicting the injury, or through whose negligence it came about, should also have been employed in such commerce, since the statute gives a right of recovery for injury or death resulting from the negligence "of any of the * * * employees of such carrier," including those

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1. **Includes every person whom congress could include.**—Colasurdo *v.* Central R. R. of New Jersey (C. Ct. S. D. N. Y. July 1, 1910), 180 Fed. 832, 837, affirmed (C. C. A.) 192 Fed. 901, 113 C. C. A. 379; Kelley *v.* Great Northern Pac. R. Co. (C. C.), 152 Fed. 211; Carr *v.* New York, etc., R. Co. (S. Ct. N. Y.), 136 N. Y. S. 501. See discussion ante, under "Scope of Act," III, C, p. 52.

2. **Both railroad and employee must have been engaged in interstate commerce.**—Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. 648 (Mr. Justice Lamar dissenting), reversing (C. C. A.), 197 Fed. 537, which affirmed (C. C.), 184 Fed. 737; Neil *v.* Idaho R. Co. (Idaho), 125 Pac. 331; Pierson *v.* New York, etc., R. Co. (Err. & App. of N. J., Nov. 21, 1912), 85 Atl. 233; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874, reversed, on other points, in 228 U. S. 702, Adv. Sheets, 57 L. Ed. 703, 33 S. Ct. 703; Lamphere *v.* Oregon, etc., R. Co. (C. C.), 193 Fed. 248, reversed on application of this rule to facts in 196 Fed. 336; Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858, 859.

engaged in intrastate commerce, the true criterion being, as heretofore pointed out, not whether the agency or employee inflicting the injury was engaged at the time in interstate commerce, but the effect of the negligent act or omission upon such commerce.[3]

And where the same man, at the time of his injury, is engaged upon duties embracing both interstate and intrastate commerce, or is at work upon an instrumentality used indiscriminately for both intrastate and interstate purposes, he is within the terms of the act, and the court will not undertake to separate such service into its intrastate and interstate elements and determine the nature and extent of each without regard to its relation to others or to the business as a whole. Such an attempt, says the Supreme Court of the United States, is based upon an erroneous assumption, and the true test in each case is: Was the work in question a part of the interstate commerce in which the carrier was engaged?[4]

Employees Engaged in Repairing Instruments of Commerce—Generally.—Under a recent decision of the Supreme Court of the United States, employees repairing instrumentalities of interstate commerce, even though such instrumentalities be also used in intrastate commerce, are deemed to be engaged in

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3. **Otherwise as to agency or employee inflicting injury.**—Second Employers' Liability Cases, 223 U. S. 1, 51, 56 L. Ed. 327, 346, 38 L. R. A. (N. S.) 44, 32 S. Ct. 169; Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. 648, Mr. Justice Lamar, dissenting; Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 340; El Paso, etc., R. Co. *v.* Gutierrez, 215 U. S. 87, 54 L. Ed. 106, 30 S. Ct. 21; Colasurdo *v.* Central R. Co. (C. C.), 180 Fed. 832, affirmed 113 C. C. A. 379, 192 Fed. 901; Watson *v.* St. Louis, etc., R. Co. (C. C.), 169 Fed. 942.

4. **Employee or instrumentality engaged in both kinds of commerce—Separating service into its elements.**—Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. 648. Justice Lamar dissenting, reversing (C. C. A.), 197 Fed. 537, which affirmed (C. C.) 184 Fed. 737. See, in accord, Central R. Co. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832; Kelley *v.* Great Northern R. Co. (C. C.), 152 Fed. 211.

interstate commerce, and within the protection of the Act of April 22, 1908, in case they sustain injuries while so engaged.[5]

Employees Repairing Tracks, Bridges, etc., Used in Both Interstate and Intrastate Traffic.—In keeping with the rule above stated, employees engaged in repairing tracks, bridges, switches, etc., used for both internal and interstate traffic are held to be employed in interstate commerce, and to be within the protection of the federal act in case they sustain injuries while so employed.[6] Thus where a railroad trackman was injured while repairing a switch in defendant's terminal yards at night, over which interstate as well as intrastate commerce was continually transported, and the car by which he was struck was being kicked into the station platform at defendant's Jersey City terminal to carry passengers coming on one of defendant's ferry-boats from New York City to a point in New Jersey, the court,

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5. **Employees engaged in repairing instruments of commerce—Generally.**—Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 33 S. Ct. 648, reversing (C. C. A.), 197 Fed. 537, which affirmed (C. C.) 184 Fed. 737.

The case of Pierson *v.* New York, etc., R. Co. (Ct. of Err. & App. of N. J.), 85 Atl. 233, 235, holding that employees engaged in repairing such instrumentalities are not employed in interstate commerce is expressly based upon the authority of the Circuit Court of Appeals decision in Pedersen *v.* Delaware, etc., R. Co., 117 C. C. A. 33, 197 Fed. 537, and can not be sustained in the face of the controlling decision of the Supreme Court of the United States reversing the decision of the Circuit Court of Appeals in the Pedersen Case.

The following cases, also based upon the decision of the Circuit Court of Appeals in the Pedersen Case, should be read in the light of the fact that said decision has been reversed. Heimbach *v.* Lehigh Valley R. Co. (Dist. Ct. E. D. Penn.), 197 Fed. 579; Feaster *v.* Philadelphia, etc., R. Co. (Dist. Ct. E. D. Penn.), 197 Fed. 580.

6. **Repairing tracks, bridges, etc., used in both interstate and intrastate traffic.**—Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. 648, reversing (C. C. A.) 197 Fed. 537, which affirmed (C. C.) 184 Fed. 737; Central R. Co. of N. J. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832; Zikos *v.* Oregon R., etc., Co. (C. C.), 179 Fed. 893; Jones *v.* Chesapeake & O. R. Co. (Ct. of App. Ky.), 149 S. W. 951.

laying down and applying the rule just stated, held that he was engaged in interstate commerce, and was therefore entitled to maintain an action for his injuries under the federal act.[7] This case and the principle stated therein has been frequently cited with approval.[8] And so a section hand who was engaged in repairing the defendant's main track, over which both interstate and intrastate traffic passed, by driving spikes in the ties for the purpose of tightening the rails and joints, was held to be engaged in interstate commerce and entitled to recover under the federal act for injuries sustained through the negligence of a fellow servant also engaged in such commerce.[9] And a fortiori as to a section hand, injured while engaged in repairing a switch so as not to delay interstate freight and passenger trains.[10]

In the Pedersen Case, the evidence, as reported in the opinion of the Federal Supreme Court, was to the following effect: The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, New Jersey. On the afternoon of his injury the plaintiff and another employee, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in "repairing that bridge," the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by pass-

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7. **Repairing switch in yard or terminal.**—Central R. Co. N. J. *v.* Colasurdo, 113 C. C. A. 379, 192 Fed. 901, affirming 180 Fed. 832.

8. **Same—Case approved.**—Northern Pac. R. Co. *v.* Maerkl (Circuit Court App. Ninth Cr. Aug. 5, 1912), 198 Fed. 1, 5; Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 338; Carr *v.* New York, etc., R. Co. (S. Ct. N. Y.), 136 N. Y. S. 501, and many others.

9. **Employee repairing main line.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893.

10. **Repairing switch to prevent delay of interstate trains.**—Jones *v.* Chesapeake & O. R. Co. (Court of App. Ky. Oct. 1, 1912), 149 S. W. 951.

ing over an intervening temporary bridge at James avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give warning. On this statement of facts the Supreme Court of the United States, three of the justices dissenting, held that the plaintiff was engaged in interstate commerce at the time of his injury, and entitled to the benefit of the federal act.[11] The law, as it must now be taken to exist, is thus laid down in the majority opinion:

"Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?"[12]

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11. **Repairing bridges—Injury sustained while carrying material used in work.**—Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 33 S. Ct. 648 (reversing (C. C. A.) 179 Fed. 537, which affirmed (C. C.) 184 Fed. 737). Mr. Justice Lamar with whom concurred Justices Lurton and Holmes, dissenting.

12. Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 649, 33 S. Ct. 648.

And again:

"True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce."[13]

Answering the contention that the plaintiff was not, at the time of his injury, engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein, the court says:

"We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce."[14]

The practical effect of the Pedersen Case is to extend, by construction, the operation of the Act of 1908 until it is nearly or quite as broad in its scope as the Act of 1906, which was declared unconstitutional as an attempt to regulate that commerce which is wholly internal; thus once again reminding us of Mr. Justice Daniel, who was of the opinion that the "vortex of federal encroachment is of a capacity ample enough for the engulfing and retention of every power," and who in an early case voiced his sentiments with respect thereto in the following language: "For myself, I would never hunt with the lion. I would anxiously avoid his path; and as far as possible keep him from my own;

13. Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 650, 33 S. Ct. 648.

14. Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 650, 33 S. Ct. 648, citing the following cases: Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336; Horton *v.* Oregon Washington R. & Nav. Co. (Wash.), 130 Pac. 897; Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 21, 49 L. Ed. 363, 371, 25 S. Ct. 158.

always bearing in mind the pregnant reply told in the Apologue as having been made to his gracious invitation to visit him in his lair; that although in the path that conducted to its entrance, innumerable footprints were to be seen, yet in the same path there could be discerned 'Nulla vestigia retrorsum.' "[15]

In view of the decision in the Pedersen Case, the decision in Taylor *v.* Southern R. Company,[16] in which it was held that a member of a railroad bridge gang, whose duties required work in the repair of bridges in different states, and who was injured while engaged within the scope of his employment in repairing a bridge on defendant's main line by an alleged defective scaffold, was not employed in interstate commerce, can not be sustained.

Original Construction of Instrumentalities.—On this point we quote the following excerpt from the majority opinion in the Pedersen Case:

"Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."[17]

The plain intimation of this language is that employees engaged upon the original construction of such instrumentalities, and before they have been used in interstate commerce, are not employed in such commerce.

Employees Engaged in Repairing Cars in Repair Shops.—Where an employee of the defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant, when working in repair shops connected with an interstate track, engaged in repairing a car used by the defendant in-

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15. Marshall *v.* Baltimore, etc., R. Co., 16 How (U. S.) 314, 346, 347, 14 L. Ed. 953.

16. **Cases out of line with Pedersen Case.**—Taylor *v.* Southern R. Co. (C. C. N. D. Ga.), 178 Fed. 380.

17. **Original construction of instrumentalities.**—Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 650, 33 S. Ct. 648.

discriminately in both interstate and intrastate commerce as occasion required, it was held that the defendant was at the time "engaged in interstate commerce," and that the employee was employed by the defendant in such commerce, within the meaning of the Employers' Liability Act of April 22, 1908, and that an action for his injury or death could be maintained thereunder.[18]

It appeared from the evidence in this case that the place where the repairing was done was on the main line of the defendant company between Tacoma, Wash., and Portland, Ore., and was connected with it by switches over which the cars needing repairs were run, and over which, after repairing, they were again put into the service of the company for use in interstate and intrastate commerce as occasion required. It was agreed that the particular car upon which the deceased was at work when injured had been for a long time indiscriminately used in interstate and intrastate commerce, and was to be again so used when repaired. Commenting upon these facts, the court said:

"That a car so used is one of the instruments of interstate commerce does not admit of doubt. It is equally plain, we think, that those engaged in the repair of such a car are as much engaged in interstate commerce as the switchman who turns the switch that passes the car from the repair shop to the main track to resume its place in the company's system of traffic, or any of the operatives who thereafter handle it in such traffic."[19]

Repairing Interstate Cars in Transit.—The judgment in the Second Employers' Liability Cases[20] disposes of three cases involving the application of the Employers' Liability Act. In

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18. **Repairing cars—In repair shops.**—Northern Pac. R. Co. *v.* Maerkl (Circuit Ct. App. Ninth Cr. Aug. 5, 1912), 198 Fed. 1. See, also, Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 339.

19. Northern Pac. R. Co. *v.* Maerkl (Circuit Court App. Ninth Cr. Aug. 5, 1912), 198 Fed. 1, 4, 5, citing Interstate Commerce Commission *v.* Illinois Central R. R. Co., 215 U. S. 452, 474, 54 L. Ed. 280, 30 S. Ct. 155.

20. **Repairing interstate cars in transit.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169.

one of the cases (Walsh *v.* New York, New Haven, etc., R. Co.), the judgment in which was affirmed, the action was brought and damages were recovered by a personal representative of a deceased employee of a railroad company. The complaint alleged that the injury occurred while the defendant as a common carrier was engaged in commerce between some of the states, and while the deceased in the course of his employment by the defendant in such commerce was engaged in replacing a drawbar on one of the defendant's cars then laden with interstate commerce in transit and, of course, in use in such commerce. The statement of the facts is meager, but it would appear therefrom that the employee who was injured was not one of a train crew, but was a machinist or repairer whose duty it was to replace drawbars, and that the work was done either in a yard or on a switch, for the injury resulted from the negligence of fellow servants in pushing other cars against the one on which the deceased was working. On this state of facts, the Supreme Court of the United States declared that the decedent was engaged in interstate commerce at the time of his death, and that the cause of action which accrued therefrom was properly prosecuted under the Employers' Liability Act.[21]

Inspection and Repair of Cars Awaiting Transfer or Return.—An employee of a railroad company, charged with the duty of seeing to the coupling of the cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which cars were being used in interstate commerce, was employed in interstate commerce while so engaged, and was within the provisions of the Employer's Liability Act of April 22, 1908.[22]

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21. **Same.**—See Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, and Rich *v.* St. Louis, etc., R. Co. (St. Louis Ct. App. Mo. July 2, 1912), 148 S. W. 1011, 1013; Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 339.

22. **Inspection and repair of cars awaiting transfer or return.**—Johnson *v.* Great Northern R. Co., 102 C. C. A. 89, 178 Fed. 643.

And where an engine and tender used by the defendant railroad company in hauling interstate trains between two points had reached the end of their run and had been placed on a fire track as usual to await the time for starting on the return trip, and the plaintiff, who was employed in making running repairs, was sent to replace a bolt which had been lost from a brake shoe of the tender, and while so employed was injured through the negligence of a fellow servant, it was held that the defendant was engaged in interstate commerce, and that plaintiff was employed therein at the time of his injury, within the meaning of the Act of April 22, 1908, and could maintain an action thereunder.[23]

The court in this case relied upon Walsh *v.* New York, New Haven & Hartford Railway Co., one of the Second Employer's Liability Cases, supra, in which the plaintiff was injured while replacing the drawbar of a car, and held that no line could be drawn between replacing a drawbar of a car and putting back a bolt into the brake shoe of a tender, nor between a fire track and any other kind of yard or terminal track.[24]

In the case of Heimbach *v.* Lehigh Valley Railway Company[25] the court, relying upon the decision of the Circuit Court of Appeals in the Pedersen Case, held that employees of a railroad company, injured while repairing a car of another company which had reached the end of its run, been unloaded, and was lying at a station awaiting orders, were not at the time employed in interstate commerce within the Act of April 22, 1908. This case is contrary to the reasoning in other similar cases, and is to be read in the light of the fact that the opinion of the Circuit Court of Appeals upon which it rests has since been reversed.

Employees on Trains Carrying Both Kinds of Traffic.—Where an employee, a railroad engineer, for example, is injured

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23. Same.—Darr *v.* Baltimore, etc., R. Co. (Dist. Ct. D. Md. June 22, 1912), 197 Fed. 665.

24. Same.—Darr *v.* Baltimore, etc., R. Co. (Dist. Ct. D. Md. June 22, 1912), 197 Fed. 665, 668.

25. Same.—Heimbach *v.* Lehigh Valley R. Co. (Dist. Ct. E. D. Penn. May 21, 1912), 197 Fed. 579, decided upon authority of Pedersen *v.* Delaware, etc., R. Co., 117 C. C. A. 33, 197 Fed. 537.

while hauling a train containing cars employed in both interstate and intrastate commerce, he is himself engaged in interstate commerce, and entitled to sue under the Employer's Liability Act.[26] This is but an illustration of the doctrine laid down in the Second Employer's Liability Cases and in the Pedersen Case that the operation of the act is not defeated by reason of the fact that the defendant and the employee were engaged in both interstate and intrastate commerce at the time of the injury.[27]

Same—Persons Employed Jointly by Railroad Company and Another—Pullman Employees, Express Agents, etc.—Persons employed jointly by a railway company and another company in the operation and management of a train are held to be employees of the railway company, within the meaning of the Employers' Liability Act.[28] Thus a porter on a Pullman car, owned jointly by the defendant railroad company and the Pullman Company, and operated by them as an association under a contract providing that the Pullman Company should have the management thereof, but that all obligations with reference to operation of the cars should be borne by the association, which should furnish one or more employees for each car, who at all times should be subject to the rules of the railroad company governing its own employees, that the earnings should be divided in certain proportions, and, in the event of liability arising against the railroad company for personal injuries to an employee of the association, the railroad company should be liable only to the same extent it would be if the person injured were an employee in fact of the railroad company, and for all excess liability the railway company should be indemnified and paid by the owners of the car, was held to be an employee of the railway company within

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26. Employees on trains carrying both kinds of traffic.—Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 72 S. E. 958.

27. Same.—Second Employer's Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44; Pedersen *v.* Delaware, etc., R. Co., 229 U. S. 146, Adv. Sheets, 57 L. Ed. 648, 33 S. Ct. 648.

28. Persons employed jointly by railroad company and another—Pullman employees, express agents, etc.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Feb. 432, 435.

the Act of April 22, 1908; and hence his personal representatives were not precluded from recovering for his death resulting from the negligence of the railway company by a provision in his contract of employment purporting to release both the Pullman Company and the railway company from such liability.[29] There can be no recovery in such a case, however, where there is no testimony offered at the trial tending to show that the relation of master and servant existed between the deceased porter and the defendant company.[30]

On the other hand, an agent of an express company, employed and paid by it, and entitled, under a contract between the company and the railroad company, to ride on trains of the railroad and care for express matter on trains, is presumed to be a passenger while on a train in the discharge of his duty, and entitled to the protection of a passenger.[31] And where, in an action against the railroad company for the death of such express agent, the evidence of plaintiff shows that decedent was an agent of the express company, employed and paid by it, and entitled to ride on the trains of the railroad company under contract between the two companies, and that he was killed through the negligence of the employees in charge of the train, the railroad company, engaged in interstate commerce, and seeking to bring the case under the Federal Employers' Liability Act, must show that plaintiff's claim is unfounded, and that decedent was also in its employ, in order to avail itself of the federal act; and where it fails to do so the state law will govern the right to recover.[32]

Employees on Way to Report for Duty, Waiting to Go Out, etc.—A locomotive fireman in the employment of a rail-

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29. Porter on pullman car.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Fed. 432.

30. Same—Evidence to show relation of master and servant.—Oliver *v.* Northern Pac. R. Co. (Dist. Ct. E. D. Wash. N. D. Feb. 5, 1912), 196 Fed. 432, 434.

31. Express agent—Presumed to be a passenger, when.—Missouri, etc., R. Co. *v.* Blalack (S. Ct. Tex. June 5, 1912), 147 S. W. 559.

32. Same.—Missouri, etc., R. Co. *v.* Blalack (S. Ct. Tex. June 5, 1912), 147 S. W. 559.

road company engaged in interstate commerce, who was ordered by his superiors to report at a station to be transported with others to another station to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants of the company, also operating an interstate train, was employed in interstate commerce at the time of his death within the meaning of the federal act.[33] In this case the court recognizes the fact that there is conflict over the proposition that an employee of a railroad company is engaged in the service of his employer, and is a fellow servant of other employees of the same master, while going to and from work, but holds that there can be no question that he is in the service of his master, and a fellow servant of his co-employees, whenever he is doing that which under his contract of employment he is bound to do, and emphasizes the fact that in this case the deceased, when killed, was not only on his way to work for his employer, but was proceeding under direct and peremptory command of the railroad company, and was on the premises of the company and in the discharge of his duty when he met his death at the hands of negligent co-employees operating a train engaged in interstate commerce and owned by the same railroad company.[34]

On the other hand, a fireman, whose run was wholly within the state, over a road owned by a company not engaged in interstate commerce, though the lessees thereof were, and who having oiled and prepared his engine, which was not then attached to any train, but which was to have hauled some freight, a part of which was interstate, was killed while crossing the tracks to his boarding house for a personal purpose, was held not to have been engaged in any kind of commerce at the time of the injury. In other words, at the time he was killed he was engaged upon

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33. Employees on way to report for duty, waiting to go out, etc.—Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336.

34. Same.—Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 337, 338.

his own, and not the company's business.[35] And where an extra conductor in the employ of a railroad company was directed, on reporting for work, to ride to another point within the same state for service on a work train, it not appearing that he was on his way to undertake any interstate service, and was injured while proceeding to his train, it was held that he was not at the time employed in interstate commerce within the purview of the federal act.[36]

Employees Preparing Interstate Trains to Go Out.—In the case of Neil *v.* Idaho Railway Company, it appeared that the plaintiff was employed by the defendant railway company as a freight conductor. On the day of the injury, his train, consisting of about twenty cars, loaded with intrastate and interstate freight, had been made up, and he had gone to the engine on the front end of his train and had a conversation with his engineer, and had given him his clearance card and was going back to his caboose. It appears from the evidence that, at the time, the car inspector was inspecting the plaintiff's train, and the plaintiff, instead of returning to his caboose on the open space between the track on which his train was standing and the "scale track," on which the switching was being done, went upon the "scale track," and, according to his testimony, was inspecting his train as he proceeded on his way to the rear of his train. Whether it was necessary for the conductor to return from the engine to the caboose on his train does not appear, but it does appear that it was not necessary for him to walk on the "scale track." It was contended by counsel for the defendant that the plaintiff, in walking upon said "scale track," could not have been engaged within the scope of his employment; that there was nothing in his employment requiring that he should be on said "scale track;" that,

35. **Same—Fireman crossing tracks on personal errand.**—Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858, 859.

36. **Conductor proceeding to take up duties on work train not shown to be interstate.**—Feaster *v.* Philadelphia, etc., R. Co. (Dist. Ct. E. D. Penn. May 21, 1912), 197 Fed. 580, decided on authority of Pedersen *v.* Delaware, etc., R. Co., 117 C. C. A. 33, 197 Fed. 537.

on the contrary, the proper discharge of his duties would require that he should not be there. Answering this contention, the court said: "While it may not have been his duty and was carelessness on his part, under the facts of this case, to walk upon said 'scale track,' still we think he was engaged in interstate commerce to the extent of getting his train ready for that purpose. It seems to us that preparation was being made to have his train leave Spirit Lake, and that he was engaged in getting his train ready for the transportation of freight both within the state and beyond its boundaries, and that he was 'engaged in interstate commerce,' within the meaning of that term as used in said act of congress."[37]

Same—Employee Preparing Ice for Use on Train Carrying Both Kinds of Traffic.—An employee of an interstate railroad company, engaged at a terminal point in preparing ice for use in passenger cars carrying interstate and intrastate passengers, was held to be engaged in interstate commerce; and hence the defendant's liability was to be governed by the federal act, under which the defense of assumption of risk is available, unless the injury was caused by the employer's violation of a statute enacted for the safety of employees, and not by the state law which precluded the defense of assumption of risk in certain cases.[38]

Employee on Water Train Filling Tanks for Use of Through and Local Trains.—In an action against a railroad company for the wrongful death of a brakeman on its train which carried water to a tank within the state, the mere fact that some of the company's engines which took water at this tank pulled trains engaged in interstate commerce did not make the train on

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37. Employees preparing interstate train to go out.—Neil *v.* Idaho R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331, 336.

38. Same—Preparing ice for train engaged in both kinds of traffic.—Freeman *v.* Powell (Tex. Civ. App. Ft. Worth, Dec. 23, 1911, rehearing denied Feb. 3, 1912), 144 S. W. 1033, writ of error denied, 148 S. W. 290, affirmed, no op.

which deceased worked one engaged in interstate commerce, so as to make the federal statute govern the cause of action.[39]

Switching Crews—Handling State and Interstate Cars—As Affected by Fact That Only Local Cars Being Handled at Time of Accident.—In the case of Behrens *v.* Illinois Central Railroad Company,[40] a fireman of one of the defendant's switch engines was killed while working on an intrastate train, although a good share of the time engaged in interstate commerce. The action was brought solely under the Federal Employers' Liability Act. He was a member of a switching crew, who reported for duty at a suburb of New Orleans, made up a train of empties intended for various destinations, and hauled these empties to another point near New Orleans, and from the second point hauled another train back to the starting point. At the time of the accident all of the cars of the train had originated at and were destined to points in the state. The court held that the employee killed was protected by the provisions of the federal act. In this case the court held that while the federal act is in derogation of the common law, yet as the elimination of the doctrine of fellow servants and the modification of the rules as to contributory negligence and assumption of risk make for the betterment of human rights as opposed to those of property, the law should, in the light of modern thought and opinion, be as broadly and as liberally construed as possible, and said:

"In this view of the case, I consider that the usual and ordinary employment of the decedent in interstate commerce, mingled though it may be with employment in commerce which is wholly intrastate, fixes his status, and fixes the status of the railroad,

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39. **Employee on water train.**—Missouri, etc., R. Co. *v.* Fesmire (Tex. Civ. App. June 22, 1912, rehearing denied Oct. 12, 1912), 150 S. W. 201.

40. **Switching crew handling state and interstate cars—Where only local cars being handled at time of injury.**—Behrens *v.* Illinois Cent. R. Co. (Dist. Ct. E. D. La. Dec. 30, 1911), 192 Fed. 581, cited in Lamphere *v.* Oregon R., etc., Co., 116 C. C. A. 156, 196 Fed. 336, 338, and Carr *v.* New York Cent. & H. R. R. Co. (Sup. Ct. N. Y.), 136 N. Y. S. 501, 503.

and the mere fact that the accident occurred while he was engaged in work on an intrastate train, rather than a few minutes earlier or later, when he might have been engaged on an interstate train, is immaterial. If he was engaged in two occupations that are so blended as to be inseparable, and where the employee himself has no control over his own actions and cannot elect as to his employment, the court should not attempt to separate and distinguish between them."[41]

Switching Intrastate Car Out of Mixed Train.—On this point the Supreme Court of New York and the Federal Circuit Court for the Eastern District of Texas hold diametrically opposite views. In the former court it was held that a brakeman on a train running between points in that state, but consisting in part of freight cars consigned to points outside the state, injured by the negligence of a fellow servant while engaged at a siding in cutting out cars shipped from and billed to points in that state, was engaged in interstate commerce within the federal act, so that an action for his injury could be maintained thereunder; the court holding that his work at the siding was merely an incident to the operation of the entire train in interstate commerce.[42]

In the latter court, where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of a train carrying both interstate and intrastate freight, it was held that his injury did not occur while he was engaged in interstate commerce, and therefore was not within the Act of April 22, 1908, the court being of the opinion that the service in which he was engaged at the time of the injury was wholly in furtherance of intrastate business.[43]

Switching Interstate Cars in Transit.—A switchman, engaged in switching in a railroad division yard a car loaded with

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41. Behrens *v.* Illinois Cent. R. Co. (Dist. Ct. E. D. La. Dec. 30, 1911), 192 Fed. 581, 582.

42. **Switching intrastate car out of mixed train.**—Carr *v.* New York, etc., R. Co. (Sup. Ct.), 136 N. Y. Supp. 501.

43. **Same.**—Van Brimmer *v.* Texas, etc., R. Co. (C. Ct. E. D. Jeff. Div. Oct. 2, 1911), 190 Fed. 394, 397.

freight and in transit from that state to another, is engaged in interstate commerce within the federal act.[44]

Switching Car Placed on Side Track for Repairs.—A freight car loaded with interstate freight, and placed on a side track in the railway yards at destination, to await simple repairs to the automatic coupler, is used in moving interstate commerce within the meaning of the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, chap. 196, U. S. Comp. Stat. 1901, p. 3174), when a coupling with another car is thereafter attempted by the carrier's order, during the course of switching operations.[45] In this case, the car was marked "in bad order," and a repair piece sent for. Instead of withdrawing the car after thus being notified of its condition, the company kept on moving it about in connection with other cars, and finally ordered the injured employee to couple it to another car. This he tried to do with the natural result, and was crippled for life. The court held that the car was being used in interstate commerce at the time of the injury and that the case amply justified the verdict, and that the judgment should be affirmed.[46]

Breaking Up or Switching Train after Arrival at Terminus.—An engineer, killed in a collision occurring just after the arrival of his train from another state at the terminus of the road in the state in which the injury occurred, and while engaged in switching certain cars of his train preparatory to placing them

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44. **Switching interstate cars in transit.**—Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011. See, also, the following cases cited in the opinion: Chicago, etc., R. Co. *v.* Voelker, 129 Fed. 522, 65 C. C. A. 226, 70 L. R. A. 264; United States *v.* Colorado, etc., R. Co., 157 Fed. 321, 85 C. C. A. 27, 15 L. R. A. (N. S.) 167, 13 Ann. Cas. 893 (C. C. A. 8th Cir.); Norfolk, etc., R. Co. *v.* Unites, 177 Fed. 623, 101 C. C. A. 249 (C. C. A. 4th Cir.).

45. **Switching car placed on side track for repairs.**—Delk *v.* St. Louis, etc., R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 S. Ct. 617.

46. **Same.**—Delk *v.* St. Louis, etc., R. Co., 220 U. S. 580, 55 L. Ed. 590, 31 S. Ct. 617, 620.

in the yards according to orders previously received, was held to be engaged in interstate commerce at the time of the accident.[47]

Yard Clerk Taking Data from Cars Just Arrived.—In the case of St. Louis, etc., R. Co. *v.* Seale,[48] which arose in a state court of Texas and was afterwards taken to the Supreme Court of the United States on a writ of error, it appeared that the defendant was a Texas corporation owning and operating a railroad extending from the boundary between Oklahoma and Texas southward through North Sherman. This railroad connected at the Oklahoma boundary with another one extending northward through Madill, and the two were so operated that trains were run through from North Sherman to Madill, and from Madill to North Sherman. The defendant was engaged in both intrastate and interstate commerce, much the larger part of the traffic handled in its North Sherman yard being interstate. The deceased was employed by the defendant as a yard clerk in that yard, and his principal duties were those of examining incoming and outgoing trains and making a record of the numbers and initials on the cars, of inspecting and making a record of the seals on the car doors, of checking the cars with the conductor's lists, and of putting cards or labels on the cars to guide switching crews in breaking up incoming, and making up outgoing trains. His duties related to both intrastate and interstate traffic, and at the time of his injury and death he was on his way through the yard to one of the tracks therein to meet an incoming freight train from Madill, Oklahoma, composed of several cars, ten of which were loaded with freight. His purpose in going to the train was that of taking the numbers of the cars and otherwise performing his duties in respect to them. While so engaged he was struck and fatally injured by a switch engine, which, it was

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47. **Breaking up or switching train after arrival at terminus.**—Kansas City, etc., R. Co. *v.* Pope (Tex. Civ. App. Ft. Worth, Nov. 9, 1912, rehearing denied Dec. 14, 1912), 152 S. W. 185.

48. **Yard clerk taking data from cars just arrived.**—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. Sheets, 57 L. Ed. 651, 33 S. Ct. 651, reversing 148 S. W. 1099.

claimed, was being negligently operated by other employees in the yard. Upon this state of facts the court said:

"In our opinion the evidence does not admit of any other view than that the case made by it was within the federal statute. The train from Oklahoma was not only an interstate train, but was engaged in the movement of interstate freight; and the duty which the deceased was performing was connected with that movement, not indirectly or remotely, but directly and immediately. The interstate transportation was not ended merely because that yard was a terminal for that train, nor even if the cars were not going to points beyond. Whether they were going further or were to stop at that station, it still was necessary that the train be broken up and the cars taken to the appropriate tracks for making up outgoing trains, or for unloading or delivering freight, and this was as much a part of the interstate transportation as was the movement across the state line."[49]

Employees Engaged in Loading or Unloading Cars.—An employee of a railroad engaged in interstate commerce, who shows that he was injured while loading rails on a flat car in consequence of the negligence of fellow servants, but who does not show whether the rails were old or new, where they came from, where they were to be taken, or where the car was to go when loaded, is not entitled to the benefit of the federal act.[50] Likewise the unloading of steel rails from a car after they had reached their destination, in which service plaintiff was injured, was held not to be interstate commerce, within the Act of April 22, 1908.[51] In this last case, the defendant, a common carrier engaged in interstate commerce, having purchased certain rails, after their arrival at destination, caused them to be moved to the place where they were to be laid, and employed plaintiff and other servants to unload them from the cars. Plaintiff was injured by the dropping of one of the rails on his foot, due to the negligence of his fellow servants. It was held that such service was not work done

49. **Same.**—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, 57 L. Ed. 651, 653, 33 S. Ct. 651, Mr. Justice Lamar, dissenting.

50. **Employees engaged in loading or unloading cars.**—Tsmura *v.* Great Northern R. Co., 58 Wash. 316, 108 Pac. 774.

51. **Same.**—Pierson *v.* New York, S. & W. R. Co. (N. J.), 85 A. 233.

in interstate commerce; and hence plaintiff could not recover under the federal act.[52]

Employee Returning from Work on Train.—An employee of a railroad company engaged in interstate commerce, who was killed in a collision while riding to his home, by permission, on one of the company's trains, but who was not at the time, and, so far as appeared, had not just previously been employed in interstate commerce, was not within the Act of April 22, 1908, and there could be no recovery thereunder for his death.[53]

Where Intrastate Road Leased to Interstate Carrier.—A railroad corporation whose tracks lie wholly within a certain state does not, by leasing its tracks to a railroad corporation engaged in interstate commerce, itself engage in interstate commerce.[54] But since a railroad corporation can not escape its responsibility by leasing its road, it is still liable for its lessee's acts, both of commission and omission, whether they occur in interstate or intrastate commerce, although the lessor is not actually engaged in either.[55]

Employees Engaged upon or about Ferryboats or Other Vessels Operated by Railway Companies.—The statute does not limit the liability of the carrier to its track or train service, but expressly refers to defects or negligence in boats, wharves, and other equipment, provided they and the injured party are engaged in interstate commerce. The maintenance of a ferry may be within the charter powers of a rail-

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52. Same.—Pierson *v.* New York, etc., R. Co. (Ct. Err. & App. of N. J. Nov. 21, 1912), 85 Atl. 233.

53. Employee returning from work on train.—Bennett *v.* Lehigh Valley R. Co. (Dist. Ct. E. D. Penn. May 21, 1912), 197 Fed. 578, decided on authority of Pedersen *v.* Delaware, etc., R. Co., 117 C. C. A. 33, 197 Fed. 537.

54. Where intrastate road leased to interstate carrier.—Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858.

55. Same.—Zachary *v.* North Carolina R. Co., 156 N. C. 496, 72 S. E. 858, 859.

road company, and although it can not be said that the voyage is a carriage by rail, the Act of April 22, 1908, as amended by the Act of April 5, 1910, applies to servants of an interstate railway employed upon a ferryboat owned by such carrier and operated in interstate commerce in connection with its railroad.[1]

Where No Interstate Freight or Passengers Actually Carried on the Particular Trip.—In conclusion of this part of the discussion it is well to note that the running of a train from one state into another for the purpose of transporting freight or passengers across the state line constitutes interstate commerce, even though it does not appear that any freight or passengers were actually carried across the state line upon that particular trip. In other words, the mere operation of the train for the purpose of transporting freight or passengers across the state line, if offered, constitutes interstate commerce.[2]

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1. **Employees upon ferryboats, etc., operated by railway company.**—The Passaic (D. C.), 190 Fed. 644, 649.

Employee unloading coal from car to boat for purpose of transshipment.—As to the case of a yard brakeman, injured while engaged in handling his brake in the process of unloading, through the device of an unloading machine, a carload of coal in transit from Pennsylvania to Wisconsin, the unloading being in connection with the transshipment from car to boat incidental to such through shipment, see the case of Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332, in which it was assumed without controversy that he was engaged in interstate commerce within the meaning of the federal act at the time of his injury, the defendant insisting, however, that the plaintiff had not stated a case within the act because not specifically basing his action thereon.

2. **Where no interstate freight or passengers actually carried on the particular trip.**—Kansas, etc., R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579.

CHAPTER XI

Enforcement of Act—Nature of Cause of Action—Abatement and Survival.

H. Enforcement of Act—1. Cause of Action Given by Act—a. General Nature; Survival of Action.—The first section of the Act of April 22, 1908, omits any provision on the subject of the survival of the right of action given the injured employee, but, in case of the death of such employee from his injury, creates a new and distinct right of action for the benefit of the dependent relatives named in the statute. Hence, as the act stood prior to the enactment of § 9, it was held under the common-law rule, that, upon the death of the injured employee, the right of action given him died also, and that there could be no recovery of damages for his conscious suffering in an action for his death.[3] Moreover, the cause of action being given by a federal statute, there could be no recourse to state statutes in order to determine whether it survived or not. It could not be pieced out by resorting to the local statutes of the state in which the proceeding was had or in which the injury occurred; the question of survival not being one of procedure, but one which depends on the substance of the cause of action.[4]

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3. **General nature of action; survival.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 67, Adv. S., 57 L. Ed. 192, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703; American Ry. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. 224, 33 S. Ct. 224, 225; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, 33 S. Ct. 651, Adv. S., 57 L. Ed. 651, 652; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1003; Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211.

4. **Same—Not aided by recourse to state statutes.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, Adv. S., 57 L. Ed. 192, 33 S. Ct. 192, 194; Walsh *v.* New York, etc., R. Co. (Mass.), 173 Fed. 494. See, also, Schreiber *v.* Sharpless, 110 U. S. 76, 80, 28 L. Ed. 65, 3 S. Ct. 423;

It is true that Rev. Stat., § 955 (U. S. Comp. Stat. 1901, p. 697), provides that: "When either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment." But this section does not itself provide what causes of action shall survive, but, in the absence of any other controlling statute, leaves the matter to the common law. As to cases arising under the Act of April 22, 1908, as originally enacted therefore, the case stood that the state statutes relating to survival were inapplicable; there was no general federal statute; and the particular statute in question, the Act of 1908, said nothing about survival. Thus remitted to the common law, at which survival is out of the question, the courts were compelled to hold that the cause of action did not survive.[5]

Such survival of the injured employee's right of action was expressly provided for by § 2 of the later amendatory Act of April 5, 1910 (36 Stat. 291; c. 143 [U. S. Comp. St. Supp. 1911, p. 1325]), adding § 9 as a new section to the Act of April 22, 1908. This, however, was held not to enlarge the measure of recovery in cases arising under the act previous to the amendment, but they were still controlled entirely by provisions of the Act of 1908.[6]

Clearly the sole purpose of adding § 9 was to provide for the survival of the action upon the death of the injured employee,

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Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 230, 43 L. Ed. 677, 19 S. Ct. 387; United States *v.* De Goer (D. C.), 38 Fed. 80; United States *v.* Riley (D. C.), 104 Fed. 275.

5. **No survival under act as originally enacted.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, Adv. S., 57 L. Ed. 192, 33 S. Ct. 192, 195; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494, 495; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002.

6. **Survival under amended act—Cases previously arising.**—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 704, 33 S. Ct. 703; Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211, 212.

since by that section the person who must bring or continue the action is the same, and the beneficiaries the same, as provided by the act before it was added.[7] The only difference is that since the addition of § 9, damages, in case the injury results in death, may now be recovered for the injury and suffering sustained by the employee as well as for his death, and for the benefit of the beneficiaries named,[8] and not for the benefit of his estate as intimated in previous cases.[9]

Only One Recovery for Same Injury.—It is expressly provided by § 9 that there shall be only one recovery for the same injury. Damages of both kinds, therefore, must be recovered in one and the same action. This is the plain meaning of the act.[10]

Not Limited to Cases Where Death Was Instantaneous.—It is hard to understand, even in the absence of the light since thrown upon the Act of 1908 by judicial decisions, how such a construction of the act could have been seriously contended for; and yet, in a case that went to the Supreme Court of the United States, counsel for the defendant railway company raised and argued the point, that the fact that the injured employee survived his injuries for several hours operated to extinguish the defendant's liability, not only for the wrongful injury, but for the death which ensued, on the theory that the act declared a single liability and gave a cause of action to the injured

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7. **Sole purpose of § 9 to provide for survival.**—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002.

8. **Same—Effect as to damages recoverable.**—Northern Pac. R. Co. *v.* Maerkl (C. C. A.), 198 Fed. 1.

9. **Same.**—See St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874, 881; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660, 664; Cain *v.* Southern R. Co. (C. C.), 199 Fed. 211, 212; Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654.

10. **Only one recovery for same injury.**—Northern Pac. R. Co. *v.* Maerkl (C. C. A.), 198 Fed. 1, 6; Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 704, 33 S. Ct. 703.

employee, if he survived the accident, or, in the event his death was instantaneous, and only in that event, a right of action for the benefit of the persons named in the act. In other words, the contention seems to have been that if the first-mentioned cause of action once arose, the second could never come into existence, and the death of the injured employee before institution of suit or recovery of judgment upon said first-mentioned cause of action operated to defeat all liability whatsoever. The Supreme Court refused to adopt this senseless and narrow view, and construed the act as giving a right of action, first, to the injured employee, which, prior to the Amendment of April 5, 1910, died with the person in case of death before recovery therein; second, a new and independent cause of action, springing up in favor of certain named beneficiaries in case of death before suit brought or recovery had upon the cause of action first mentioned.[11]

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11. **Not limited to cases where death was instantaneous.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. 192, 33 S. Ct. 192, 193.

CHAPTER XII

To Whom Cause of Action Given.

b. To Whom Given.—In view of the plain provisions of the federal act giving the right of action to the personal representative of the deceased employee, it would seem that no question could have arisen as to the proper party to bring the suit in those cases in which the injury results in death; and yet several cases have arisen in which the action was attempted to be brought by the widow or next of kin, or some person other than the personal representative. By the decisions in these same cases it is now settled as thoroughly as any point could well be, that, as regards the proper party plaintiff, the federal act is exclusive of and supersedes all state and territorial legislation, and that in those cases in which the injury results in death the action must be brought or continued by and in the name of the personal representative, and no one else; and unless the action is so prosecuted, there can be no recovery under the federal act.[12]

Of course, where the heirs, next of kin, or other parties at in-

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12. **Action—Brought solely by personal representative in case of death.**—American R. Co. *v.* Birch, 224 U. S. 547, 557, 56 L. Ed. 879, 882, 32 S. Ct. 603; Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 576, 57 L. Ed. 274, 33 S. Ct. 135; Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 443, 57 L. Ed. 274, 33 S. Ct. 274; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, 57 L. Ed. 651, 652, 33 S. Ct. 651, Mr. Justice Lamar, dissenting; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 704, 33 S. Ct. 703; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432; Kansas, etc., R. Co. *v.* Pope (Tex. Civ. App.), 152 S. W. 185; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App.), 149 S. W. 841; Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307; Fulgham *v.* Midland Valley R. Co. (C. C.), 167 Fed. 660, 662; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180; rehearing denied Oct. 12, 1912; Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654.

terest consider that the injury occurred wholly outside the channels of interstate commerce and that the federal act is not applicable, they may proceed under the state law, and bring the action in the name of the widow, next of kin, or whoever may be the proper person designated by the state law to bring such action;[13] but should it be shown by the declaration in such case, or developed in the evidence, that the injury occurred while the defendant and the employee were engaging in interstate commerce, the exclusive operation of the federal act would at once come into play, and no recovery could be had upon the action as brought.[14]

Thus in a case arising in the Federal Circuit Court for the Northern District of Georgia, the plaintiff sued as the widow of her deceased husband, who was killed in the employ of the defendant railway company. The suit was brought under the Georgia statute, which provides that a widow may recover for the homicide of her husband. The declaration disclosed the fact, however, that the deceased was running as an engineer at the time he was killed on a train engaged in interstate commerce; consequently, it was held that the action, founded on a state statute, could not be maintained.[15] And in a case arising in Porto Rico, where there existed a local employers' liability act when the federal statute was enacted, and which gave a cause of action under certain conditions to the widow of the deceased, or to his

13. **Same—Injuries occurring outside channels of interstate commerce.**—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App.), 148 S. W. 1099.

14. **Same—Where pleading or evidence shows case under federal act.**—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 652, 33 S. Ct. 651; Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 443, Adv. S., 57 L. Ed. 274, 33 S. Ct. 274; Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 576, Adv. S., 57 L. Ed. 274, 33 S. Ct. 135; American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App.), 149 S. W. 841; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011; Kansas, etc., R. Co. *v.* Pope (Tex. Civ. App.), 152 S. W. 185.

15. **Same—Same.**—Dewberry *v.* Southern R. Co. (C. C.), 175 Fed. 307.

children or dependent parents, an action brought by the widow and only son of the deceased was held by the lower court to have been properly brought in the name of the only persons for whose benefit any recovery could be had, and that the federal act was not to be construed as requiring a surviving husband or wife, in the absence of any estate belonging to the deceased, other than his right to sue, to have an administrator appointed solely for the purpose of bringing the suit. In reversing the lower court on this point, the Supreme Court of the United States said:

"But the words of the act will not yield to such a liberal construction. They are too clear to be other than strictly followed. They give an action for damages to the person injured, or, 'in case of his death, * * * to his or her personal representative.' It is true that the recovery of the damages is not for the benefit of the estate of the deceased, but for the benefit 'of the surviving widow or husband and children.' But this distinction between the parties to sue and the parties to be benefited by the suit makes clear the purpose of congress. To this purpose we must yield, even if we could say, as we can not, that it is not a better provision than to give the cause of action to those in relation to the deceased. In the present case it looks like a useless circumlocution to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of congress expressed in the language it used."[16]

It is true, therefore, that under the federal statute a plaintiff can not, although he or she be the sole beneficiary, maintain an action except as the personal representative of the deceased.[17] By the same token, where an action brought by the personal rep-

16. **Same—Action by sole beneficiaries where no other estate than mere right to sue.**—American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603, 606, followed in Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

17. **Same—Same—Only personal representative can sue.**—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137; American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 653, 33 S. Ct. 651.

resentative of the deceased and based specifically upon the federal act can not be sustained under that act for the reason, among others, that it arose, if at all, prior to the passage of that act, neither can it be sustained under a state law which gives the right of action to the parents, even though it set out facts showing a cause of action under the state law, since damages to the estate of a deceased minor for which a personal representative might maintain an action would be a distinct cause of action from damages to his parents resulting from his death, and for which the state law gives a cause of action to the parents.[18]

Same—Pleading Facts—Amendment of Declaration or Complaint.—As previously stated, where the plaintiff is uncertain as to whether the injury occurred while the employee was engaged in intrastate or interstate commerce, he may plead the facts and then recover under either the state or federal law according as the evidence may develop, subject to the usual rules governing variances between the pleadings and proof. But from what has already been said, it at once appears that this does not solve the problem as to the proper party plaintiff in those instances in which the state law provides for the bringing of the action by a person or persons different from the person prescribed by the federal act, and that he must still face the danger of bringing the suit in the name of the party prescribed by the one act only to fail because of the evidence developing a case calling for the exclusive operation of the other. The proper recourse in such an event is to resort either to a nonsuit or to an amendment changing the relation in which the plaintiff sues to the relation prescribed by the statute, state or federal, as the case may be. That such an amendment is permissible has recently been held in a case decided by the Federal Supreme Court, in which it was held that the trial court, in the exercise of its authority under U. S. Rev. Stat., § 954, U. S. Comp. Stat. 1901, p. 696, may allow an amendment to the petition in an action brought by the sole sur-

18. **Same—When action based on federal act proves to be governed by state law.**—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. 273, affirming 173 Fed. 65.

viving parent in her individual capacity, to recover damages from an interstate railway carrier for the death of her unmarried and childless son while engaged as its employee in interstate commerce, by which, for the first time, she set up the right to sue as personal representative, in which capacity alone could her action under the Act of April 22, 1908, be maintained.[19]

This right of amendment is subject, of course, to the limitation that it must not introduce or undertake to set up a new cause of action upon the facts.[20] In the case last cited, where the plaintiff sued first as heir at law or next of kin to recover for the death of her unmarried and childless son, basing her right to recover upon the state law, it was held that a mere amendment, by which, without stating any new facts as the ground of action, she set up for the first time the right to sue as personal representative, was not equivalent to the commencement of a new action for the purpose of applying the two years' limitation prescribed by the federal act, and that her pleading was not vitiated by the reference to the state law any more than it would have been by a reference to any other repealed statute.[21] But in the Hall Case, cited in the note as arising under the Act of June 11, 1906, where it appeared that the state law gave the right of action to the widow, when there was one, for her sole benefit, whereas the federal act gave such right to the personal representative alone and for the benefit of the widow and children or dependent next

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19. Pleading facts—Amendment as to party plaintiff or as to beneficiaries of suit.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135.

See, also, a case arising under the Act of June 11, 1906, in which the plaintiff sued as widow of the deceased, and it was held that she might amend her declaration so as to change her relation to that of administratrix. Hall *v.* Louisville, etc., R. Co. (C. C.), 157 Fed. 464.

20. Same—Limitations of right of amendment.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

21. Amendment as commencement of new action—Statute of limitations.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137, distinguishing Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983, 15 S. Ct. 817.

of kin, it was held that the action brought in the state court, and in the plaintiff's capacity as widow, was necessarily based upon the state law, and that the amendment of the declaration, changing the capacity in which she sued to that of administratrix, necessarily introduced a new and different cause of action based on the federal statute, and was, in effect, the bringing of a new action thereunder, which, for the purpose of limitation, must be considered as having begun when the amendment was filed, and did not relate back to the time of the commencement of the original action.[22]

The Supreme Court of the United States itself has made some very close distinctions as to what constitutes a new and distinct cause of action in such cases, distinctions that it is not always easy to follow;[23] but however this may be, it must be conceded that under the doctrine of the Wulf Case an amendment which merely changes the capacity in which the plaintiff sues is entirely permissible and relates back to the beginning of the action, and that the decision of the Hall Case and any similar case must be considered as governed by its ruling authority.

Doctrine as to Nonsuit.—As regards a nonsuit, it has been held that where, at the time of the dismissal of an action to enforce an alleged common-law liability for the death of a railway employee, it was within the discretion of the court to dismiss the entire action without prejudice, it was equally within the court's power to dismiss without prejudice to the commencement of a new action to recover for decedent's death under the federal act.[24]

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22. Same—Same.—Hall *v.* Louisville, etc., R. Co. (C. C.), 157 Fed. 464.

23. Distinctions as to amendments introducing new cause of action.—See Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135; Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983, 15 S. Ct. 817; Winfree *v.* Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. 273, affirming 173 Fed. 65; Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 57 L. Ed. 274, 33 S. Ct. 274, reversing 200 Fed. 44.

24. Doctrine as to nonsuit.—Oliver *v.* Northern Pac. R. Co. (D. C.), 196 Fed. 432.

As to whether a judgment in the case as brought—that is, where the plaintiff does not suffer a nonsuit nor effect an amendment changing the capacity in which he sues—can be pleaded in bar of another action depends upon principles now to be considered.

Former Judgment as Res Adjudicata.—As it is impracticable in a treatise of this kind to enter into a general discussion of the subject of res adjudicata, or estoppel by former judgment, we can not do better than to give the holding of the Supreme Court of the United States in a very recent case which arose under the Act of April 22, 1908, as amended by the Act of April 5, 1910. In the case in question, the suit was originally brought by the widow and surviving children of the deceased seeking a recovery under the state law, and the question at issue was whether a judgment rendered in that suit as brought was a bar to a subsequent action brought by the widow as administratrix, for the benefit of herself and the said children, against the same defendant, under the federal act. The Circuit Court of Appeals, reversing the lower court, was of the opinion that it was, upon the ground that the parties were essentially the same in both actions. The Supreme Court of the United States, in reversing the Circuit Court of Appeals, laid down the governing principles as follows, quoting from the syllabus and the opinion:

"Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy; but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit.

"To work an estoppel, the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties, and there must be identity of parties in the two actions.

"A suit for damages for causing death brought by the widow and surviving children of the deceased under the state law is not on the same cause of action as one subsequently brought by the

widow as administratrix against the same defendant under the Employers' Liability Act, and the judgment dismissing the complaint in the first action is not a bar as res judicata to the second suit."[25]

In other words, the fact that the plaintiff attempted to recover under the state law and pursued the supposed remedy until the court adjudged that it never existed would not of itself preclude the subsequent pursuit of a remedy for relief to which in law she is entitled under the federal act; neither were the parties in the second case identical nor essentially the same as those in the first, for, said the court:

"Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow servants was not involved in or concluded by the first suit. Furthermore, it is well settled that to work an estoppel by judgment there must have been identity of parties in the two actions. * * *[26] The Circuit Court of Appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were essentially the same in both actions—the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children—and held that, except in mere form, the actions were for the benefit of the same persons and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical and would have been curable by amendment. This conclusion was reached before this court announced its decision in American R. Co. *v.* Birch, 224 U. S. 547, 56 L. Ed. 879, 32 S. Ct. 603. That action was brought under the Federal Employers' Liability Act by the widow and son of the decedent and not by the administrator. The lower court held that the requirement of the act that the suit should be brought in case of death by the personal representative of the deceased did not prevent a suit in

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25. Former judgment as res adjudicata.—Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 57 L. Ed. 274, 33 S. Ct. 274, reversing 200 Fed. 44.

26. Citing Brown *v.* Fletcher's Estate, 210 U. S. 82, 52 L. Ed. 966, 28 S. Ct. 702; Ingersoll *v.* Coram, 211 U. S. 335, 53 L. Ed. 208, 29 S. Ct. 92.

the name of the persons entitled to the benefit of the recovery. In other words, the court ruled, as did the Circuit Court of Appeals in this case, that where it was shown that the widow and child were the sole beneficiaries, they might maintain the action without the appointment of a personal representative. This court denied the contention and held that congress, doubtless for good reasons, had specifically provided that an action under the Employers' Liability Act could be brought only by the personal representative, and the judgment was reversed without prejudice to the rights of such personal representative. We think that under the ruling in the Birch Case there was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."[27]

Suit by Foreign Personal Representative.—Where there is a state statute which, ex vi termini, or as construed by the courts of that state, authorizes a foreign personal representative to sue in the courts of that state upon a cause of action for death by wrongful act, there can be no doubt as to the right of such a representative to maintain such a suit upon a cause of action arising under the Federal Employers' Liability Act.[28]

In the case cited, the injury occurred in Oklahoma and the suit was brought in a state court in Arkansas. It did not appear, said the Arkansas court, whether the plaintiff, who had taken out original letters of administration in Oklahoma and ancillary letters in Arkansas, sued by virtue of the Oklahoma appointment or under authority of the letters ancillary; but it was expressly held that the point was immaterial, since under the Arkansas statutes as construed by the courts of that state she was entitled to sue by virtue of either appointment. It is but fair to say, however, that the point that the action arose under and was controlled by the federal act was not raised until afterward upon rehearing, and that the right of the plaintiff to

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27. **Same.**—Troxell *v.* Delaware, etc., R. Co., 227 U. S. 434, 444, 57 L. Ed. 274, 33 S. Ct. 274, reversing 200 Fed. 44. See, also, the same case below, 185 Fed. 540, 183 Fed. 373, 105 C. C. A. 593, 180 Fed. 871.

28. **Suit by foreign personal representative—When authorized by statute.**—Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654.

maintain the action was not brought in question upon such rehearing.[29]

As a question of general law, the right of a foreign personal representative to maintain in the courts, state or federal, of another state an action for death by wrongful act is very uncertain and dependent in any particular case upon principles not within the range of this discussion. Any one making an examination of the cases on the subject is apt to find that any supposed line of cleavage will lead him through a maze of obscure distinctions, only to be in the end entirely obliterated by conflicting decisions. Suffice it to say that the weight of authority is against the existence of any such right upon the part of a foreign representative in cases of wrongful death, except as given by statute. To any one interested in an investigation of the subject, however, the cases cited in the note are sufficient to give a line upon most of the others.[30]

As to cases arising under the federal act, it is the opinion of the writer, given for what it is worth, that the principles laid down as governing the right of a foreign representative to sue, in the absence of statutory authority, upon a right of action for wrongful death arising under a state statute, are inapplicable, and that under the federal act the personal representative has the right to sue in any proper venue and in any proper court, state or federal, without regard to whether it be in the state or jurisdiction in which he qualified as such representative or not. This conclusion is based, first, upon the general supremacy and con-

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29. **Same.**—Midland Valley R. Co. *v.* Le Moyne (Ark.), 148 S. W. 654, 662.

30. **Right of foreign representative to sue in absence of statute.**—Dennick *v.* Railroad Co., 103 U. S. 11, 26 L. Ed. 439; Sanbo *v.* Union Pac. Coal Co. (C. C.), 130 Fed. 52; Dodge *v.* North Hudson (C. C.), 177 Fed. 986; Cornell Co. *v.* Ward, 93 C. C. A. 473, 168 Fed. 51, 52; Baltimore, etc., R. Co. *v.* Evans, 110 C. C. A. 158, 188 Fed. 6; St. Bernard *v.* Shane (D. C.), 201 Fed. 453; St. Louis, etc., Co. *v.* Graham, 83 Ark. 61, 102 S. W. 700; Hall *v.* Southern R. Co., 146 N. C. 345, 59 S. E. 879; S. C., 62 S. E. 899; Low Moor Iron Co. *v.* La Bianca, 106 Va. 83, 55 S. E. 532; Robertson *v.* Chicago, etc., R. Co., 122 Wis. 66, 99 N. W. 433, 66 L. R. A. 919.

trolling authority of the federal act as an expression of the constitutional right of congress to create the right of action and confer it upon whom it saw fit; second, upon the nature of the right conferred upon the personal representative, the cause of action being, not for the benefit of the estate, but for the benefit of certain surviving relatives and next of kin, thus harmonizing with the distinction made in many cases which permit suits to be brought by foreign representatives where they sue otherwise than in their strict representative capacity and for the benefit of the estate.

The writer confesses, however, that he has found but one case arising under the federal act which involved the right of the personal representative to sue in a foreign jurisdiction in the absence of a state statute conferring the privilege. In Brooks *v.* Southern Pacific Railway Company, which arose under the Act of June 11, 1906, it appeared that the deceased, who had his domicil in the state of Kansas, was employed as a fireman by the defendant railway company and was killed in an accident in the course of his employment upon an interstate train of said company in the state of Nevada. The mother of the deceased qualified as his administratrix in the state of Kansas, and brought suit against the defendant in the Federal Circuit Court in the Western District of Kentucky, the defendant being a Kentucky corporation. The court held that while there were some cases which seemed to support the contention that a personal representative qualified in one state could not sue in the courts of another state without authority from such other state, yet in order that the plaintiff might have a remedy which could be enforced against the corporation, which had no residence in the state of the plaintiff's domicil, it would, for the purpose of a suit based on the act of congress, treat the plaintiff as the personal representative of the deceased within the purview of the act and entitled to sue in that jurisdiction. But as the court further held the act to be unconstitutional upon various grounds set forth in the opinion, thus remitting the parties to such rights and liabilities as they might have under the state statutes and decisions, it recurred to this point, and proceeded to hold that, independ-

ently of the federal act, which it deemed to be invalid, a personal representative qualified in one state could not sue in another state without authorization by the latter, and that as the Kentucky statute authorizing suits to recover *debts* by foreign personal representatives could not be invoked in support of an action to recover damages for a *tort*, the plaintiff had no standing to maintain the suit in that state. The significant point in the whole case is that the court was of the opinion that, had the Act of June 11, 1906, been constitutional, the personal representative could have maintained the suit in the foreign jurisdiction even in the absence of any state statute conferring the privilege in that class of cases.[31]

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31. **Same—In cases arising under the federal act.**—Brooks *v.* Southern Pac. Co. (C. C.), 148 Fed. 986.

CHAPTER XIII

Beneficiaries under Act—Dependency Clause.

c. For Whose Benefit.—Both the Act of April 22, 1908, and the Amendment of April 5, 1910, adding § 9, provide that the action given shall be, not for the benefit of the estate, but for the benefit "of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee."[32] It is well settled that this provision, like all others of the act, is exclusive in all cases in which the act applies, and that the distribution of damages recovered for the death of an employee resulting from injuries sustained while engaged in interstate commerce is governed by this provision of the federal act, any state law upon the subject to the contrary notwithstanding.[33]

Existence of Beneficiaries in One Class as Excluding Other Classes.—By the federal statute the cause of action is given, in case of the death of the employee, to the personal rep-

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32. **For whose benefit action given.**—See the Act of April 22, 1908, and Amendment of April 5, 1910. See, also, the following cases: Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1004; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703, Adv. Sheet; Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 67, 68, 57 L. Ed. 192, 33 S. Ct. 192; American R. Co. *v.* Didricksen, 227 U. S. 145, 149, 57 L. Ed. 224, 33 S. Ct. 224; Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, 175, 57 L. Ed. 426, 33 S. Ct. 426; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

33. **Same—Exclusive operation of this provision.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1, 6; Rich *v.* St. Louis, etc., R. Co. (Mo. App.), 148 S. W. 1011, 1014; Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

resentative of the deceased, for the benefit of the surviving widow or husband and children of the employee, if there be such persons, to the exclusion of the other beneficiaries named therein.[34] In other words, under the federal statute, if there be persons of the first class mentioned therein, all the persons of the second and third class are excluded, and no cause of action is given for their benefit for any damages which may have resulted to them on account of the death of the employee.[35]

Thus where a brakeman, who received fatal injuries from being thrown from the top of a car en route to another state, left a wife and child surviving, his dependent mother had no right of action against the railroad company, the right of action in such case being controlled by the federal act which gives a right of action to the parents for the wrongful death of an employee only when he leaves no wife or child surviving.[36] And in another case, in which the parties attempted to proceed in accordance with the state law and sued in their individual capacities, the Supreme Court of the United States, holding that the employee was engaged in interstate commerce at the time of his injury and that the action should have been brought by the personal representative in accordance with the federal act, said:

"Two of the plaintiffs, the father and mother, in whose favor there was a separate recovery, are not even beneficiaries under the federal statute, there being a surviving widow; and she was not entitled to recover in her own name, but only through the deceased's personal representative, as is shown by the terms of the statute and the decisions before cited."[37]

Dependency and Pecuniary Expectation of Beneficiaries.—As a matter of mere grammatical construction, there can

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34. Existence of beneficiaries in one class as excluding other classes.—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180.

35. Same.—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180.

36. Parents excluded where wife or child survives.—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178.

37. Same.—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv., S., 57 L. Ed. 651, 653, 33 S. Ct. 651.

be no doubt that what is known as the "dependency clause" or requirement of the statute applies in terms solely to those beneficiaries coming within the third class, the language of the Act of April 22, 1908, both in the original (§ 1) and in the Amendment of April 5, 1910 (§ 9), being: "to his or her personal representative, for the benefit of the surviving widow or husband of and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee," etc. But the Supreme Court of the United States, disregarding the grammatical construction of the act, holds that, in its distinguishing features, it is essentially identical with Lord Campbell's Act, and that like that act, it must be construed as awarding damages for pecuniary loss only, and that in order to enable any beneficiary in any class to share in the damages recovered, it must appear that there was some dependency, or some reasonable expectation of pecuniary assistance or support of which such beneficiary has been deprived, and that the recovery must be limited to compensating only those who have sustained such pecuniary loss.[38]

The application of this construction of the statute is strikingly shown in the McGinnis Case, in which the action was originally brought in a state court of Texas under the Federal Act of April 22, 1908, by the administratrix of McGinnis for the benefit of his widow and four surviving children; the widow suing as administratrix for the benefit of herself and the four children named in the petition. It appears from the report of

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38. Dependency and pecuniary expectation of beneficiaries.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 70, 33 S. Ct. 192, 195, 57 L. Ed. 192; Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 713, Adv. S., 57 L. Ed. 426, 33 S. Ct. 426. See, also, American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. 224, 33 S. Ct. 224, 225.

These cases overrule the construction placed upon the act in a dictum by the Supreme Court of Montana, wherein it was said: "By the very terms of the statute, the heirs or next of kin, other than those who stood in the relation of husband, wife, children, or parents, are not beneficiaries unless they were dependent upon the decedent during his lifetime." Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1004.

the case that one of the surviving children was Mrs. Nellie Sanders, a married woman residing with and maintained by her husband. There was neither allegation nor evidence that Mrs. Sanders was in any way dependent upon the decedent, nor that she had any reasonable expectation of any pecuniary benefit as a result of a continuation of his life. The court was requested to instruct the jury that it could not find any damages in favor of Mrs. Sanders, but this it declined to do. On the other hand, the jury were instructed that, if they found for the plaintiff, to return a verdict for such a sum as would justly compensate the persons for whose benefit the suit was brought for such pecuniary benefits as they might believe from the evidence any of the beneficiaries had a reasonable expectation of receiving from the deceased, if his death had not been so occasioned. They were further told to find a round sum in favor of the plaintiff and then apportion that sum among all the persons for whom the suit had been brought, and to state in their verdict, "how much, if anything, you find for each of said persons." The jury returned a verdict for $15,000, and apportioned it, one-half to the widow and the remainder equally among the four children, including Mrs. Sanders.

The Texas Court of Civil Appeals upheld this ruling, saying that the federal statute expressly authorized a suit to be brought by the personal representative for the benefit of the surviving wife and children of the deceased, irrespective of whether they were dependent upon him, or had the right to expect any pecuniary assistance from him.[39] In reversing this judgment of the Texas Court of Civil Appeals, the United States Supreme Court held, that as Mrs. Sanders was not shown to be in any way dependent upon her father (the decedent) nor to have had any reasonable expectation of any pecuniary benefit resulting from a continuation of his life, she was not entitled to share in the recovery, nor should any recovery have been had upon her account in the absence of such a showing.[40]

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39. See 147 S. W. 1189.

40. **Application of principle; excluding child who was not dependent.**—Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, Adv. S., 57 L. Ed. 426, 33 S. Ct. 426.

Recovery Not for Equal Benefit of Beneficiaries.—It follows from what has just been said, and is expressly so held, that the action brought under the statute by the personal representative is not for the equal benefit of each of the surviving relatives for whose benefit the suit is brought, and that though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual loss, the jury making the apportionment and excluding all recovery in behalf of such as show no pecuniary loss.[41]

Character of Expectation or Dependency.—The McGinnis Case undoubtedly establishes that there can be no recovery, even on the part of a child, where there was no dependency and no reasonable expectation of pecuniary benefits resulting from a continuance of the life of the deceased employee. The question then arises as to the character of the expectation which the beneficiary must have had, and the character of the obligation, if any, resting upon the deceased to render pecuniary aid to such beneficiary, had he (the deceased) continued to live. On this point it was held in the case of Michigan Cent. R. Co. *v.* Vreeland, in which the action was brought by the personal representative for the benefit of the widow of the deceased, that the pecuniary loss recoverable under the Act of April 22, 1908, by one dependent upon the employee wrongfully killed, must be a loss which can be measured by some standard, and that it does not include an inestimable loss, such as that of the society and companionship of the deceased, or of care and advice in case of a husband for his wife; but that: "The pecuniary loss is not dependent upon any *legal* liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived."[42]

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41. **Recovery not for equal benefit of beneficiaries.**—Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 73, Adv. S., 57 L. Ed. 526, 33 S. Ct. 426.

42. **Character of expectation or dependency.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 70, 57 L. Ed. 192, 33 S. Ct. 192.

Effect of Separation or Divorce on Rights of Widow as Beneficiary.—That a wife was temporarily separated from her husband at the time he was killed while in defendant's employ does not affect her right to recover damages under the Employers' Liability Act for his wrongful death.[43]

Existence of Beneficiaries a Jurisdictional Fact.—The existence of some one or more beneficiaries answering the description of those named in the act is a jurisdictional prerequisite to the right to recover, and such fact must be alleged and proved; otherwise the court should sustain a demurrer or direct a verdict for the defendant.[44] It is true that ordinarily the presumption may be indulged that every decedent leaves heirs; but, by the very terms of the statute, the heirs or next of kin are not beneficiaries unless they were dependent upon the decedent during his lifetime, and there is no presumption that all or any of the next of kin of a decedent were so dependent upon him. The existence of a beneficiary within the description of the statute is a necessary prerequisite—an issuable fact—therefore, and must be alleged and proved.[45]

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43. **Effect of separation or divorce on rights of widow as beneficiary.**—Dunbar *v.* Charleston, etc., R. Co. (C. C.). 186 Fed. 175.

44. **Existence of beneficiaries a jurisdictional fact.**—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

45. **Same—Allegation and proof.**—Melzner *v.* Northern Pac. R. Co. (Mont.), 127 Pac. 1002, 1004; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

CHAPTER XIV

Time in Which Action to Be Brought.

2. Time to Sue and Limitation of Actions.—The Act of June 11, 1906, limited the right of action thereunder to one year from the date of the injury.[46] Section 6 of the present Act of April 22, 1908, provides that no action shall be maintained thereunder unless commenced within two years from the day the cause of action accrued.

Amendment Setting Up New Cause of Action.—See ante, "To Whom Given," III, H, 1, b, pp. 93, 97.

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46. Time to sue and limitation of actions.—See Act Cong. June 11, 1906, c. 3073, § 1, 34 Stat. 232, U. S. Comp. St. Supp. 1907, p. 891; Winfree *v.* Northern Pac. R. Co., 97 C. C. A. 392, 173 Fed. 65.

CHAPTER XV

Jurisdiction of Courts and Removal of Causes.

3. Jurisdiction—a. Of the Federal Courts.—Previous to any provision in the act to that effect, any cause of action within its terms was within the jurisdiction of a federal circuit court, without reference to the citizenship of the parties, where the requisite amount was involved, as a suit of a civil nature arising under the laws of the United States.[1] By § 6 of the act, as amended April 5, 1910, it was expressly provided that actions under the act might be brought in the circuit courts of the United States; and now, of course, since the abolition of those courts, under the Judicial Code, in the federal district courts.[2] And where a suit brought under the act involves a determination of the meaning of the phrase "person employed by such carrier in interstate commerce" federal jurisdiction exists, even though the complaint should be dismissed because the plaintiff was not a person so employed.[3]

Admiralty Jurisdiction of Federal Courts.—Whether or not the Act of April 22, 1908, has, by implication, repealed the federal statutory provision permitting shipowners to limit their liability, in so far as such latter provision might be in-

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1. **Jurisdiction of the federal courts.**—Cound *v.* Atchison, etc., R. Co. (C. Ct. W. D. Texas, El Paso Div., Nov. 6, 1909), 173 Fed. 527; Zikos *v.* Oregon R. Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 904; Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762; Clark *v.* Southern Pac. (C. Ct. W. D. Tex. El Paso Div. Dec. 20, 1909), 175 Fed. 122.

2. **Action now brought in federal district courts.**—Act of March 3, 1911, ch. 13, §§ 289-296, 36 Stat. L. 1167.

3. **Suit involving construction of act—Effect of dismissal.**—Colasurdo *v.* Central R. R. of New Jersey (C. Ct. S. D. N. Y., July 1, 1910), 180 Fed. 832, affirmed (C. C. A.), 192 Fed. 901, 113 C. C. A. 379.

voked by a railway company to limit its liability for injuries to employees upon vessels used by it in interstate commerce, it does not deprive a court of admiralty of its general jurisdiction over limitation of liability because such a claim is involved, nor of jurisdiction to hear and determine a claim on its merits therein, with the consent of the claimant, or where the proceeding was begun before the passage of the statute and where any objection to jurisdiction on such ground has been waived.[4]

b. Concurrent Jurisdiction of State Courts.—It is a general principle that a right given by a federal statute may be enforced in the state courts, unless jurisdiction has been expressly, or by necessary implication, reserved to the federal courts.[5] And previous to the existence of any express provision to that effect in the Employers' Liability Act itself, it was well settled that actions arising thereunder might be maintained in the state as well as the federal courts where their jurisdiction, as prescribed by local laws, was adequate to the occasion.[6] But the existence of such concurrent jurisdiction in the state courts, as well as the power of congress to confer it, having been denied by the Supreme Court of Errors of Connecticut in the case in Hoxie *v.* New York, etc., R. Company,[7] congress

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4. **Admiralty jurisdiction.**—The Passaic (Dist. Ct. E. D. N. Y., Aug. 3, 1911), 190 Fed. 644.

5. **Concurrent jurisdiction of state courts—General rule.**—Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1; Owens *v.* Chicago, etc., R. Co., 113 Minn. 49, 128 N. W. 1011; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

6. **Same—Under the Act of April 22, 1908.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; St. Louis, etc., R. Co. *v.* Conley, 110 C. C. A. 97, 187 Fed. 949; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893; Owens *v.* Chicago, etc., R. Co., 113 Minn. 49, 128 N. W. 1011, 1013; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, 1180.

7. Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., Co., 82 Conn. 373, 73 Atl. 762, and reversed in Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. 169.

enacted the Amendment of April 5, 1910, in which § 6 is amended so as to provide, inter alia, that: "The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states;" the object of such express provision being, as stated in the report of the Senate Judiciary Committee, to leave no excuse for the courts of other states to follow in the error of the Supreme Court of Errors of Connecticut.[8] This particular provision added nothing to the act, of course, since, as stated, the existence of concurrent jurisdiction in the state courts was already well established; hence there is no merit in the contention made in cases brought since this amendment, upon causes of action arising before, that the jurisdiction of the federal courts is, as to those actions, exclusive.[9]

Constitutionality.—There is no doubt as to the constitutionality of this provision of the act.[10]

Duty of State Courts to Take Jurisdiction.—Nor may jurisdiction of an action to enforce rights arising under the Act of April 22, 1908, be declined by the courts of a state whose ordinary jurisdiction, as prescribed by local laws, is adequate to the occasion, on the theory that such statute is not in har-

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8. **Same—Express provision of act.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D., June 4, 1910), 179 Fed. 893, 902.

9. **Effect of express provision as to cases previously arising.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169; Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App. June 29, 1912), 149 S. W. 841, 843; St. Louis, etc., R. Co. *v.* Geer (Civ. App. Dallas, June 22, 1912, rehearing denied, Oct. 12, 1912), 149 S. W. 1178, 1180; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1, 6; Owens *v.* Chicago, etc., R. Co., 113 Minn. 49, 128 N. W. 1011, 1013; Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D., June 4, 1910), 179 Fed. 893, 901.

10. **Constitutionality of provision as to concurrent jurisdiction.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169, reversing Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762.

mony with the policy of the state, or that the exercise of such jurisdiction will be attended by inconvenience and confusion because of the different standards of right established by the congressional act and those recognized by the laws of the state.[11] The constitution of the United States being the supreme law of the land, state and federal courts are alike subject to its provisions, and the refusal of the former to enforce rights conferred by congress would put them in the same category as would a refusal to entertain causes flowing from any other recognized source of authority. It would be an anomaly in our system if state tribunals, after having so long entertained the grievances of litigants, where rights are traceable to congressional legislation, should refuse to do so further because of the fact that there has been provided by a power clearly competent different rules of liability for those engaged in interstate commerce from those which may be fixed by statute or recognized by decisions in the several states.[12]

c. Removal of Cause.—Prior to Express Prohibition Contained in Act.—Previous to the incorporation of the prohibition against removal into § 6 of the act by the Amendment of April 5, 1910, causes arising under the act and brought in the state courts might be removed to the federal courts subject to the rules applicable in other cases.[13] In accordance with those rules, it was held that an action brought in reliance upon the Act of April 22, 1908, was not removable as one involving a federal question where the declaration con-

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11. **Duty of state courts to take jurisdiction.**—Second Employers' Liability Cases, 223 U. S. 1, 56 L. Ed. 327, 32 S. Ct. 169 reversing Hoxie *v.* New York, etc., R. Co., 82 Conn. 352, 73 Atl. 754, followed in Mondou *v.* New York, etc., R. Co., 82 Conn. 373, 73 Atl. 762. See, also, Midland Valley R. Co. *v.* Le Moyne (Sup. Ark. May 27, 1912. On rehearing, July 1, 1912), 148 S. W. 654.

12. **Same.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D. June 4, 1910), 179 Fed. 893, 901.

13. **Removal of cause—Prior to express prohibition against removal.**—Zikos *v.* Oregon R., etc., Co. (C. Ct. E. D. Wash., E. D., June 4, 1910), 179 Fed. 893, 900.

tained no statement or suggestion that the result of the suit would depend upon the construction of the act.[14] And where removal was had on the ground of diversity of citizenship, the case was not subject to remand on it appearing that the parties were of the same citizenship, if federal jurisdiction was further shown by the fact that the suit involved a construction of the act, it being a law of the United States.[15] Other cases, involving questions as to the joinder of resident and nonresident defendants in order to prevent removal,[16] the right to remove where neither party was a resident of the district,[17] and the waiver of objections in such case,[18] are cited below.

Removal Subsequent to Express Prohibition Embodied in Act.—The general purpose and effect of the Amendment of 1910 (Act April 5, 1910, c. 143, 36 Stat. 291 [U. S. Comp. St. Supp. 1911, p. 1325]) to the Act of April 22, 1908, providing that no case arising thereunder and brought in any state court of competent jurisdiction shall be removed to any court of the United States, is to withdraw the right of removal in cases arising under the act when the action has been instituted in the state court, and to require litigants desiring to have the results of the trial reviewed by reason of the presence of a

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14. **Same—Where declaration failed to show case arising under the act.**—Nelson *v.* Southern R. Co. (C. Ct. N. D. Ga. June 21, 1909), 172 Fed. 478.

15. **Removal for diversity of citizenship—Failure of proof—Remand.**—Colasurdo *v.* Central R. R. of New Jersey (C. Ct. S. D. N. Y., July 1, 1910), 180 Fed. 832, affirmed (C. C. A.), 192 Fed. 901, 113 C. C. A. 379.

16. **Miscellaneous cases involving right to remove previous to express prohibition against removal.**—Taylor *v.* Southern R. Co. (C. Ct. N. D. Ga. April 23, 1910), 178 Fed. 380.

17. Ex parte Wisener, 203 U. S. 449, 51 L. Ed. 264, 27 S. Ct. 150; Bottoms *v.* St. Louis, etc., R. Co. (Cir. Ct. N. D. Ga., May 3, 1910), 179 Fed. 318, 319; Clark *v.* Southern Pac. Co. (C. Ct. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122, 126.

18. In re Moore, 209 U. S. 496, 52 L. Ed. 904, 28 S. Ct. 587; Clark *v.* Southern Pac. Co. (C. Ct. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122, 127.

federal question to proceed by writ of error to the state court making final disposition of the cause in its jurisdiction.[19]

Since the incorporation of this express prohibition against removal into § 6 of the act, however, the question has arisen whether removal may not be had where there is ground therefor under some other law, notably, for example, diversity of citizenship. In a case arising in the Federal Circuit Court for the Eastern District of Texas it was held that the prohibition contained in the act did not prevent a removal in case there was a diversity of citizenship, the court being of the opinion that congress, having created a liability by the Act of April 22, 1908, which did not exist before, and seeing that the volume of litigation growing out of that act which would reach the federal courts was destined to be very large, intended only to say that the act alone should not give a defendant the right to remove a cause of action brought originally in the state court; and that there was no intention on the part of congress to destroy the right of removal which a defendant might have by virtue of some other provision of law.[20] Reason and the practically unanimous weight of authority, however, combine to support the opposite view, and there can be no doubt that the fact that the case is one arising under and controlled by the federal act is sufficient to prevent its being removed into a federal court upon any ground whatsoever.[21] Not only is this conclusion deducible from the perfectly plain language of the act itself, and the impropriety of the courts reading into it exceptions, the discussion of which

19. **Removal subsequent to express prohibition—General effect of provision against removal.**—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

20. **Same—Right to remove on other grounds.**—Van Brimmer *v.* Texas, etc., R. Co. (C. Ct. E. D. Tex. Jeff. Div., Oct. 2, 1911), 190 Fed. 394, 398, 399.

21. **Same—Weight of authority against right to remove upon any ground.**—Strauser *v.* Chicago, etc., R. Co. (Dist. Ct. D. Neb., Hastings Div.), 193 Fed. 293; Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark. Tex. Div.), 192 Fed. 353; Ullrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y.), 193 Fed. 768; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579.

congress evidently intended to foreclose,[22] but a reference to the debates in congress, upon the passage of the amended section, is sufficient, as pointed out in several cases, to dispel all doubt, and to show that it was the intention of congress to give the plaintiff his choice of a forum in actions arising under the act, and, such choice having been once made, to prevent a removal thereafter upon any ground. This is made perfectly plain by the following brief history of its enactment taken from a late case:

"The bill amending § 6 of the Employer's Liability Act, approved April 22, 1908, was considered in the Senate on March 30, 1910. As the bill left the House and reached the Senate, the clause in question read as follows:

" 'The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states.' Congressional Rec., Second Sess. 61st Congress, vol. 45, part IV, p. 3994.

"The question of removal was fully discussed. In the course of the discussion the following amendment was presented:

" 'Provided, that every common carrier by railroad subject to the provisions of this act shall be deemed a citizen of every state into or through which its line of railroad shall be constructed or extend.' Id., p. 3995.

"This was criticised on the ground that it would not fully effect the purpose intended; that is, the denial of the right of removal. It was shown that this amendment would affect only the right of removal on the ground of diverse citizenship, and would not affect the right of removal on the ground that a federal question was involved. The discussion was resumed in the Senate the next day. Senator Paynter, of Kentucky, said:

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22. Same—Language of act conclusive.—Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark.), 192 Fed. 353, 354; Ullrich *v.* New York, etc., R. Co. (Dist. S. D. N. Y.), 193 Fed. 768, 770; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 581; Strauser *v.* Chicago, etc., R. Co. (Dist. Ct. D. Neb. Hastings Div., Feb. 12, 1912), 193 Fed. 293.

" 'I offer an amendment which will give to the plaintiff the right to select the forum in which his case shall be tried. He can select the federal or the state court, as he may prefer, to try his case arising under the act in question.'

"The amendment offered was as follows:

" 'And no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.'

"Upon the reading of the proposed amendment, Mr. Bailey, of Texas, said:

" 'That, Mr. President, is entirely agreeable to me, because it takes these cases out of the operation of the removal act.' Id. 4051.

"This amendment was adopted and incorporated in the bill. The House concurred on April 2, 1910, on which date this amendment was discussed. It was stated by Mr. Mann, of Illinois, that the effect of the amendment was that suits brought under the act should not be subject to removal, 'no matter what the amount or citizenship.' Mr. Parker, who had charge of the bill, added:

" 'No matter what the amount or citizenship. The idea was that a writ of error would issue only upon a federal question at the termination of the suit.' Id. 4158.

"These discussions disclose fully the intention of congress. The language plainly expresses that intention, and excludes any other."[28]

If further authority in favor of this view were needed, it is found in the fact that the prohibition in question has been reenacted by congress as a proviso to § 28 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087); for it is quite plain that the Judicial Code, in its general purpose, seeks further to restrict the jurisdiction of the federal courts, and that a special

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23. Same—Construction by reference to debates in congress.—Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark. Texarkana Div., Nov. 20, 1911), 192 Fed. 353, 355. See, also, Ullrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y. Feb. 17, 1912), 193 Fed. 768, 769, 770.

restriction of this kind, placed as it is at the close of the section granting the general right of removal, shows that congress intended that no case arising under the act referred to therein should be removed from the state court upon any ground. In other words, it is obvious that, in its re-enactment as a part of § 28 of the Judicial Code, congress had in mind all of the various grounds of removal, including diversity of citizenship and local influence and prejudice.[24]

Constitutionality of Prohibition against Removal.—The contention made in several cases that this prohibition against removal is unconstitutional has been held to be without merit. The right of removal to a federal court in any case being entirely statutory and non-existent in the absence of an act of congress conferring such right, it can hardly be said that an act prohibiting removal is unconstitutional; and the courts have so held with reference to the prohibition embodied in this section.[25]

When Cause Shown under Act within This Prohibition.—In connection with the question as to the right to still remove causes arising under the federal act on the ground of diverse citizenship, it becomes very material to consider when a cause may be said to arise under the act. For example, in a case which came up in the Federal District Court for the Southern District of New York, upon a motion to remand the cause to the state court, it appeared that the complaint stated a cause of action under, not only the federal act, but also under the New York Labor Law (Consol. Laws N. Y. 1909, c. 31, § 200, et seq.), and lastly under the common law; and upon a contention that the defendant was entitled to remove the causes of action stated under the state statute and the common law, it was held that it was

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24. Construction by reference to its re-enactment into Judicial Code.—Strauser *v.* Chicago, etc., R. Co. (Dist. Ct. D. Neb. Hastings Div., Feb. 12, 1912), 193 Fed. 293, 294.

25. Constitutionality of prohibition against removal.—Kansas City So. R. Co. *v.* Cook (Sup. Ct. Ark., Oct. 23, 1911), 100 Ark. 467, 140 S. W. 579; Symonds *v.* St. Louis, etc., R. Co. (Cir. Ct. W. D. Ark. Texarkana Div., Nov. 20, 1911), 192 Fed. 253, 254.

enough to avoid the jurisdiction of the federal court for all purposes that the plaintiff had alleged that he was engaged in interstate commerce, and Judge Hand, in upholding the jurisdiction of the state court as to all three causes of action shown, said:

"Analogy exists for the interpretation in those cases in which a federal court, having one ground of jurisdiction, can dispose of the whole case, though it involves other matters (Railroad Co. *v.* Mississippi, 102 U. S. 135, 26 L. Ed. 96), as, indeed, in those in which the jurisdiction remains, though the allegations of jurisdiction prove unsupported (City Railway Co. *v.* Citizens' Steel Railroad Co., 166 U. S. 557, 41 L. Ed. 1114, 17 S. Ct. Rep. 653). So here, though the defendant could remove, were it not for the allegations which bring the case within the employer's liability act, I think it could not have been the intention of congress to sever three such knitted causes of action, and bring two into this court, while the other stayed where it was. The 'case' arose, I think, for all purposes under the act."[26]

Where an action was instituted in an Iowa state court by an Iowa administratrix against an Illinois railroad company engaged in interstate commerce for the death of plaintiff's intestate while employed by defendant in such commerce, and the petition failed to allege that decedent left surviving him a widow, child, parent, or next of kin, for whose benefit a right of action survived under the federal act, it was held that the petition did not state a cause of action thereunder, notwithstanding it alleged that, by reason of the facts set forth therein, a cause of action had accrued to the plaintiff against the defendant under and by virtue of that act; and hence the action was held removable for diversity of citizenship.[27]

Fraudulent Allegations Designed to Prevent Removal.—Where the defendant would otherwise be entitled to remove,

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26. When cause shown under act within this prohibition—Setting out case under state, common, and federal law.—Ullrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y., Feb. 17, 1912), 193 Fed. 768, 771.

27. Same—Failure to allege beneficiaries named by statute.—Thomas *v.* Chicago, etc., R. Co. (Dist. Ct. N. D. Iowa, Cedar Rapids Div., Feb. 17, 1913), 202 Fed. 766.

he may show that the plaintiff has made false and fraudulent allegations of jurisdictional facts with intent to prevent a removal, as that he has made a fraudulent joinder of defendants and fraudulently based his action on the federal act for the purpose of defeating a removal.[28] In such case, however, the petition seeking a removal must not only allege bad faith and fraud, but such facts and circumstances as will be sufficient, if true, to demonstrate that the plaintiff is making a fraudulent attempt to impose upon the court and deprive the petitioner of his right of removal; and this, notwithstanding the rule that where a petition for removal contains sufficient facts to require a removal, the state court cannot pass upon or decide the issues of fact so raised.[29] Allegations in a petition for removal, in an action against a foreign railroad company and a domestic corporation whose road it had leased, denying that plaintiff was engaged in interstate commerce at the time of his injury, and alleging that he had made a fraudulent joinder of defendants and had fraudulently based his action upon the federal act for the purpose of preventing a removal to the federal courts, are not sufficient to justify a removal where it appears from a perusal of the pleadings and the admissions of record not inconsistent therewith that plaintiff was in its employ as a locomotive engineer, that he had been operating the engine, defects in which caused the injury sued for, over a portion of the leased road used as a part of the petitioner's trunk line and on to a point in another state and engaged in moving interstate freight trains, that the engine having been taken to the shops for repairs was at the time of the injury on a side track connecting with the main line of the leased road ready for a trial trip to another point in the same state, and that plaintiff was inspecting and oiling it for the purpose of taking such trip and with a view of further service for the petitioner.[30]

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28. Fraudulent allegations designed to prevent removal.—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

29. Same—Allegation and proof of facts.—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

30. Same—Same.—Lloyd *v.* North Carolina R. Co. (N. Car.), 78 S. E. 489.

CHAPTER XVI

Venue.

4. Venue.—Section 6 of the Act of April 22, 1908, as amended April 5, 1910, provides: "Under this act an action may be brought in a circuit court (now district court) of the United States, in the district of the residence of the defendant or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." As to cases arising under the act and involving questions of venue previous to this amendment, see below.[31]

Waiver of Objections.—Where, in an action in a federal court by an employee against a railroad company for a personal injury, the petition does not expressly declare upon the federal act, but the court submits the case to the jury upon the theory that it is based on that statute, the failure of the defendant at any time to raise the objection that it is not suable under such statute in that district is a waiver of such objection.[32]

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31. Venue previous to Amendment of April 5, 1910.—Smith *v.* Detroit, etc., R. Co. (C. Ct. N. D. Ohio, W. D., Dec. 9, 1909), 175 Fed. 506; Clark *v.* Southern Pac. Co. (Ct. C. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122; Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La., Jan. 24, 1910), 176 Fed. 130.

Venue of suit by foreign personal representative.—As to the venue of a suit brought by a foreign personal representative under the Act of June 11, 1906, and the right of such representative to sue, see ante, "To Whom Given," III, H, 1, b, pp. 93, 101.

32. Waiver of objection to venue.—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

CHAPTER XVII

Party Plaintiff.

5. Party Plaintiff.—See ante, "To Whom Given," III, H, 1, b, p. 93.

CHAPTER XVIII

Pleadings.

6. Declaration or Complaint.—Unnecessary to Plead Statutes.—A right of action for wrongful death being unknown to the common law, it is essential that it be based upon some applicable statute.[33] But under the doctrines relating to the judicial notice of statutes, it is not necessary to plead the federal statute in order to rely thereon in an action in a state court, since it is not a foreign law as to the state courts. It is sufficient to set out a statement of facts bringing the case within the terms of the statute.[34] The case is different from taking a constitutional point in a state court for writ of error to the Federal Supreme Court.[35] Neither is it necessary to plead the statute in the federal courts or refer thereto in the declaration in order to confer jurisdiction. If the facts are sufficient to sustain an action under the statute, appropriate allegations thereof are all that is necessary, since it is the duty of the courts, state and federal, to take notice of and enforce the laws of the United States, and they are presumed to be cognizant thereof without pleading, and to know that this particular act had the effect of superseding all state laws with respect to the responsibility of interstate carriers by railroad to their employees injured in such commerce after its enactment.[36]

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33. Declaration or complaint—Necessity for basing statutory action upon applicable statute.—Michigan, etc., R. Co. *v.* Vreeland, 227 U. S. 59, 67, 57 L. Ed. 192, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 652, 33 S. Ct. 651.

34. Same—Unnecessary to specifically plead or refer to statute in state courts.—St. Louis, etc., R. Co. *v.* Hesterly, 90 Ark. 240, 135 S. W. 874; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 580.

35. Same.—Ullrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y.), 193 Fed. 768, 771.

36. Same—In federal courts.—Missouri, etc., R. Co. *v.* Wulf, 226

The proper procedure, as heretofore stated, is to plead the facts,[37] setting them out, if need be, in separate counts, where the local practice permits.[38] If, however, the plaintiff does undertake to plead the statute, state or federal, an erroneous reference to the one in a cause of action which, if sustained at all, must legally rest upon the other, will not invalidate the pleading, but such erroneous plea or reference to the statute may be stricken out as surplusage, and then if there is enough left to state a cause of action under the applicable law the case may proceed to judgment accordingly; or the plaintiff may amend so as to bring himself within the applicable statute subject to the rules applicable to the introduction of new causes of action by amendment.[39] Of course, in order to have the benefit of the federal statute in either the state or federal courts, or to recover under either the state or federal law, it is necessary that the declaration or complaint should allege facts sufficient to show a case under the one law or the other.[40] An alleged right, under the federal

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U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135; Ullrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y., Feb. 17, 1912), 193 Fed. 768, 771; Cound *v.* Atchison, etc., R. Co. (C. C. & W. D. Tex.), 173 Fed. 527, 532; Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La.), 176 Fed. 130; Smith *v.* Detroit, etc., R. Co. (C. Ct. N. D. Ohio), 175 Fed. 506; Clark *v.* Southern Pac. R. Co. (C. C.), 175 Fed. 122; Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 580.

37. Plaintiff should plead the facts.—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332. See, also, ante, "Exclusive or Controlling Operation of Federal Act—Superseding State Law," III, G, 2, pp. 53, 61.

38. Setting out facts in separate counts.—Thomas *v.* Chicago, etc., R. Co. (Dist. Ct. N. D. Iowa), 202 Fed. 766.

39. Effect of erroneous plea or reference to statute.—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 57, 57 L. Ed. 274, 33 S. Ct. 135, 137. See, also, Erie R. Co. *v.* Kennedy (C. C. A.), 191 Fed. 332. And see ante, "Exclusive or Controlling Operation of Federal Act—Superseding State Law," III, G, 2, pp. 53, 61; "To Whom Given," III, H, 1, b, pp. 93, 96.

40. Declaration must allege facts showing a case under statute.—Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; Walton *v.* Southern R. Co. (C. C. N. Dist. Ga.), 179 Fed. 175, 176; St. Louis,

statute, not specially set up in the state court and there passed upon, cannot be considered by the Federal Supreme Court on writ of error to a state court.[41]

The plaintiff who desires to avail himself of the federal act has the burden of alleging and proving a case within the statute.[42] If, however, the declaration or complaint does show a state of facts sufficient to bring the case within the statute, it will be presumed that the case is brought under the statute and the declaration or complaint will be so construed and the action will be governed by the act, whether the same be specifically declared on or not.[43] On the other hand, where the declaration or complaint fails to allege facts showing a case within the statute, it will be presumed and held that the plaintiff is not seeking a recovery under the federal act, but under the state law, and the sufficiency of the declaration or complaint will be tested by the state law;[44] and where, under the rules of pleading in vogue in

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etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Tsmura *v.* Great Northern R. Co., 58 Wash. 316, 108 Pac. 774; Whittaker *v.* Illinois, etc., R. Co. (C. C. E. D. La.), 176 Fed. 130; Missouri, etc., R. Co. *v.* Neaves (Tex. Civ. App.), 127 S. W. 1090, 1091, affirmed, no op.; Missouri, etc., R. Co. *v.* Hawley (Tex. Civ. App.), 123 S. W. 726; Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

41. Rights not set up in state court not available upon writ of error.—Chicago, etc., R. Co. *v.* Hackett, 228 U. S. 559, Adv. S., 57 L. Ed. 581, 33 S. Ct. 581.

42. Burden upon plaintiff to show a case under the statute, if he desires to proceed under same.—Tsmura *v.* Great Northern R. Co., 58 Wash. 316, 108 Pac. 774; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1.

43. Action presumed brought under statute where declaration sufficient.—Whittaker *v.* Illinois, etc., R. Co. (C. Ct. E. D. La., Jan. 24, 1910), 176 Fed. 130; Cound *v.* Atchison, etc., R. Co. (C. Ct. W. D. Texas, El Paso Div., Nov. 6, 1909), 173 Fed. 527, 532; Smith *v.* Detroit, etc., R. Co. (C. Ct. N. D. Ohio, W. D., Dec. 9, 1909), 175 Fed. 506.

44. Otherwise where declaration fails to allege case under statute.—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App., June 15, 1912, on rehearing, June 22, 1912), 148 S. W. 1099, affirmed, no op.; Mis-

the state, the plaintiff is not required to make specific allegations as to the character of the commerce in which he and the defendant were engaging at the time of the injury the declaration or complaint will not be subject to demurrer as failing to show whether the plaintiff is proceeding under the federal act or under the state law.[45]

Thus, in one of the cases cited, it was held that where, in an action for injuries to a brakeman by an alleged defect in a freight car, there was no evidence that the train or any car in it, or any item of freight contained in any car forming a part of the train, was destined or carried to a point outside the state, but it appeared that defendant's road was wholly within the state, and that it operated no trains outside of it, defendant was not prejudiced by the overruling of a special demurrer to the petition for its failure to allege whether, when plaintiff was injured, defendant was engaged in interstate or intrastate commerce.[46]

What is here said as to demurrer applies, of course, to actions brought in the state courts, for if the action is brought in the federal courts, and the jurisdiction is dependent upon showing a case under the federal act, it is necessary to show specifically the character of the commerce in which the defendant and the injured employee were engaged at the time of the accident in order to show a case within the jurisdiction of the court.[47]

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souri, etc., Ry. Co. *v.* Neaves (Ct. of Civ. App. of Tex. April 9, 1910, rehearing denied April 30, 1910), 127 S. W. 1090, 1091, affirmed no op.; Missouri, etc., R. Co. *v.* Hawley, 123 S. W. 726; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1; Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

45. **Same—Want of specific allegations as to character of commerce—Demurrer.**—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App. on rehearing), 148 S. W. 1099, affirmed, no op.; Missouri, etc., Ry. Co. *v.* Neaves (Ct. of Civ. App. of Tex., Apr. 9, 1910, rehearing denied Apr. 30, 1910), 127 S. W. 1090, affirmed no op.; Missouri, etc., R. Co. *v.* Hawley (Tex. Civ. App.), 123 S. W. 726.

46. **Same.**—Missouri, K. & T. Ry. Co. of Tex. *v.* Hawley (Ct. Civ. App. of Tex., Dec. 4, 1909), 123 S. W. 726.

47. **Same—Where action in federal court and jurisdiction dependent upon federal act.**—Walton *v.* Southern R. Co. (C. Ct. N. D. Ga.), 179 Fed. 175.

Allegations Necessary to Show Cause of Action under Federal Act—That Plaintiff and Defendant Were Engaged in Interstate Commerce.—In order to state a cause of action under the federal act, it is essential that the plaintiff's pleading should allege that the defendant, at the time of the injury, was a common carrier engaged in interstate commerce by railroad,[48] and it should further allege the facts showing that plaintiff, or the deceased, was injured while employed by the defendant in connection with such commerce.[49] Thus a complaint which alleged that defendant "was a railroad corporation operating a line of railroad in the State of Oklahoma, and was * * * a common carrier of freight and passengers for hire" in that state, but which did not allege that it was engaging in interstate commerce, or that decedent was injured while employed by it in connection with such commerce, was insufficient to show a cause of action under the federal act.[50] And an allegation in the declaration that "at the time of the injuries hereinafter complained of your petitioner was engaged in the transportation of interstate commerce" is insufficient to state a cause of action under the federal act in the absence of any allegation that defendant was a common carrier engaged in interstate commerce by railroad.[51] So an employee of a railroad engaging in interstate commerce, who showed that he was injured while loading rails on a flat car in consequence of the negligence of fellow servants, but who did not show whether the rails were old or new, where they

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48. **Allegations necessary to show case under federal act—Character of commerce.**—Walton *v.* Southern Ry. Co. (Cir. Ct. N. D. Ga., Apr. 30, 1910), 179 Fed. 175, 176; St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Tsmura *v.* Great Northern R. Co., 58 Wash. 316, 108 Pac. 774.

49. **Same—That plaintiff or deceased was engaged therein.**—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874; Tsmura *v.* Great Northern R. Co., 58 Wash. 316, 108 Pac. 774.

50. **Same.**—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

51. **Same—That defendant was a common carrier by rail engaging in interstate commerce.**—Walton *v.* Southern Ry. Co. (Cir. Ct. N. D. Ga., Apr. 30, 1910), 179 Fed. 175.

came from, where they were to be taken, or where the car was to go when loaded, was held not to be entitled to the benefits of the act.[52]

On the other hand, allegations that the defendant railway company, a Missouri corporation, was engaged as a common carrier of commerce between the states of Missouri, Kansas, Arkansas and Texas, and that plaintiff was employed at the time of his injury as a swing brakeman on a local freight train running from Texas into Arkansas, were sufficient to show that plaintiff's injury occurred while he and the defendant were engaged in interstate commerce, so as to bring the case within the Act of April 22, 1908, as amended by the Act of April 5, 1910. The allegation being plainly to the effect that the train was running from the State of Texas into the State of Arkansas, it was immaterial that it was described as a local freight train, and without specific allegation that it was then carrying consignments across the state line. The mere operation of the train across the state line for the purpose of carrying such interstate shipments as might be offered was of itself interstate commerce without regard to whether it actually carried any shipments of that character upon that particular trip or not.[53] Nor was it necessary for the complaint to contain a statement that the particular defective car which caused the injury was one used in interstate traffic. If it constituted a part of the train at the time plaintiff was injured, and he was then engaged in discharging his duties in operating a train engaged in interstate commerce, it is sufficient.[54]

Where the complaint alleges, not only those facts upon which depends the "right" created by the federal act, but also those upon which depend another "right," created by the state law,

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52. Necessary allegations where employee injured while loading or unloading cars.—Tsmura *v.* Great Northern R. Co., 58 Wash. 316, 108 Pac. 774.

53. Allegations where brakeman injured on train carrying both kinds of commerce.—Kansas City So. R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 580.

54. Same—Allegations as to particular defective car.—Kansas, etc., R. Co. *v.* Cook, 100 Ark. 467, 140 S. W. 579, 580.

and, moreover, those upon which the common law "right" depends, it is sufficient. The "case," for all purposes, arises under the Federal Employers' Liability Act when the plaintiff alleges that he was himself engaged in interstate commerce and was injured by an interstate railroad.[55]

And where the injury occurred in one of the territories, a petition which alleged injury to plaintiff by the negligence of a carrier while plaintiff was in the performance of his duty, sufficiently showed that the action was based on the federal act, though it did not so allege in terms.[56]

Same—Existence of Beneficiaries.—The complaint in an action under the statute for the death of a railroad employee must allege the existence of persons answering the description of the beneficiaries named in the statute; because the action is statutory, and without the statute the right to bring it would not exist. The representative is vested with the right to bring it, but only for the benefit of those who are named in the statute. He is thereby made a statutory trustee for them, not for the benefit of the decedent's estate. The fund recovered goes to the beneficiaries, not by virtue of the law of succession, but because it is given them by the statute. Therefore, if there is no beneficiary within the description of the statute, there is no right of action; for the liability of the defendant is made contingent upon the existence of one or more beneficiaries. If there are none, there is no liability. The existence of one or more beneficiaries answering the description of those named in the statute is, therefore, a jurisdictional averment.[57]

Certainty of Allegations.—Whether the defendant was engaged in intrastate or interstate commerce at the time being a

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55. Complaint setting out cause under state, federal, and common law.—Ullrich *v.* New York, etc., R. Co. (Dist. Ct. S. D. N. Y., Feb. 17, 1912), 193 Fed. 768, 771.

56. Where injury occurs in territory.—Clark *v.* Southern Pac. Co. (C. Ct. W. D. Tex., El Paso Div., Dec. 20, 1909), 175 Fed. 122.

57. Complaint must allege existence of beneficiaries.—Melzner *v.* Northern Pac. R. Co. (Sup. Ct. Mont., Oct. 26, 1912), 127 Pac. 1002; Thomas *v.* Chicago, etc., R. Co. (D. C.), 202 Fed. 766.

matter peculiarly within defendant's knowledge, the plaintiff is not required to allege such fact with the certainty required as to facts within his own knowledge.[58]

Amendment of Declaration or Complaint.—As to amending the declaration or complaint so as to change the capacity in which the plaintiff sues, see ante, "To Whom Given," III, H, 1, b, pp. 93, 96.

7. Plea or Answer.—It has been held that where, in an action in a state court, the plaintiff sets forth a state of facts showing that he is entitled to recover under the state law, the defendant seeking to invoke the federal statute to defeat the plaintiff's right to recover in accordance with the state law, must plead the same;[59] otherwise, the fact that plaintiff, when he received the injury sued for, was engaged in interstate commerce, not having been pleaded, and so not being in issue, will not be admissible in evidence, or, if admitted, is subject to be stricken out.[60]

There is nothing unreasonable in the requirement that a defendant proposing to defend upon the ground that the action is controlled by the federal act shall either plead the same or interpose it by proper objections. The important question is as to the time in which such plea must be tendered or objection raised. In the Bradbury Case, cited in the notes, it was held not to be an abuse of discretion to sustain a motion to strike an amendment to the answer, filed after all the evidence was adduced, raising the issue that plaintiff's injury was received while employed on

58. **Certainty of allegations.**—Missouri, K. & T. Ry. Co. *v.* Hawley (Ct. Civ. App. of Tex., Dec. 4, 1909), 123 S. W. 726.

59. **Necessity for defendant's pleading federal act.**—St. Louis, etc., R. Co. *v.* Seale (Tex. Civ. App., June 15, 1912, on rehearing, June 22, 1912), 148 S. W. 1099, reversed on the facts and on the issue as to whether or not the defendant's objection that the action was controlled by the federal act was offered in time, in St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 33 S. Ct. 651; Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1.

60. **Same—Admissibility of evidence—Variance.**—Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1.

a train engaged in interstate commerce.[61] And in a Georgia case heretofore cited, in which the plaintiff specifically based his action upon the Alabama statute, it otherwise appearing from the petition, and afterwards from the evidence, that the case arose in interstate commerce and was controlled by the federal act, it was held that an amendment to the answer setting up that fact was in the nature of a plea in abatement and came too late because not filed at the appearance term.[62] The error, if any, in the ruling in that case was harmless, however, since it further appears that the court discarded all references in the petition to the Alabama statute and tried the case under, and gave judgment in accordance with, the federal act.[63]

In the Seale Case, it was held by the Federal Supreme Court, reversing the Texas court, that an objection by an interstate railway carrier sued for the death of an employee that, if liable at all, it was under the Federal Act of April 22, 1908, and, by the terms of that act, liable only to the personal representatives of the deceased, and not to the plaintiffs, who were his widow and parents, was interposed in time, so that the state court erred in overruling it, where the petition stated a case under the state statute, and the carrier, having called attention to the federal statute by special exceptions, and having suggested that the state statute might not be the applicable one, again made the specific objection, grounded on the federal statute, after the evidence disclosed that the real case was controlled by such statute.[64] Upon familiar principles, the decision of the Supreme Court in the Seale Case is not only clearly right, but, in the opinion of the writer, the court might very properly have gone further and

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61. Time of interposing plea or objection that case is controlled by federal act.—Bradbury *v.* Chicago, etc., R. Co., 149 Iowa 51, 128 N. W. 1.

62. Same.—Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086, 1089.

63. Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086.

64. Same—Rule in Seale Case.—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 33 S. Ct. 651, reversing 148 S. W. 1099.

held that such objection may be raised for the first time at any stage of the proceedings, and that the Georgia decision and other cases holding such objection to be in the nature of a dilatory plea, which must be plead in order, are erroneous, for the simple reason that the controlling effect of the federal act, operating, when it applies at all, to supersede the state law, as regards that case, as effectively as though the latter had never been enacted, renders the question jurisdictional, with the consequent right to the defendant to raise it at any stage of the proceeding. And such, in effect, has been the ruling of one of the Texas courts of civil appeal in a case wherein it was held that the right of action for the death of an employee of a railroad, engaged in interstate commerce and killed while in such employment, being wholly dependent on the Act of April 22, 1908, declaring the railroad liable to deceased's personal representative for the benefit of certain persons, the right to insist on the defense that the action cannot be maintained by the beneficiaries was not waived by first answering to the merits in an action brought by them.[65]

The objection that a carrier sued for the death of an employee is estopped to rely upon the Act of April 22, 1908, by having pleaded contributory negligence, and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to a state court, where the latter court held that the federal question was sufficiently raised and decided it.[66] Moreover, as pointed out by the court, since the plaintiff, and not the defendant, had the election as to how the suit should be brought, and elected to bring it under the state law, the defendant had no choice if it was to defend upon the facts.[67]

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65. **Same—Plea of statute held not waived by first answering to merits.**—Gulf, etc., R. Co. *v.* Lester (Tex. Civ. App., June 29, 1912), 149 S. W. 841.

66. **Estoppel to rely upon federal act by reason of plea of contributory negligence.**—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703.

67. **Same.**—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703.

Plea to Venue, Where Action Brought in Federal Court.—Where the complaint in an action brought in a federal court does not specifically base the action upon either the state or federal statute, an objection that the action is brought in the wrong venue is waived if not urged at the proper time.[68]

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68. **Plea to venue, where action brought in federal court.**—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

CHAPTER XIX

Defenses to Action.

8. Matters of Defense.—Contributory Negligence and Assumption of Risk.—The federal act modifies the defense of contributory negligence where there is negligence on the part of the company, and restricts the defense of assumption of risk where the company has violated any statutes enacted for the safety of the employee;[1] otherwise, under said act, the defense of assumption of risk remains as at common law;[2] and the term "statute," as used in this connection, means any federal statute, and, in the absence of such statute, an employee may assume the risk of injury.[3] The question whether the employee complained of the defective condition of the cars, machinery, or other equipment and continued to use the defective appliance under a promise to repair is for the jury.[4] Under the act, contributory negligence on the part of the plaintiff is not a bar to recovery; but the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employee.[5]

Fellow Servants.—See ante, "Principal Changes Made by Act," III, D, p. 38.

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1. **Same.**—Neil *v.* Idaho R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331.

2. **Matters of defense—Contributory negligence and assumption of risk.**—Neil *v.* Idaho R. Co. (St. Ct. Idaho, June 4, 1912), 125 Pac. 331.

3. **Same—Violation of statute—Term "statute" construed.**—Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 78 S. E. 494.

4. **Questions for jury—Continuance in service after promise to repair.**—Horton *v.* Seaboard Air Line R. Co. (N. C.), 78 S. E. 494.

5. **Diminution of damages in case of contributory negligence.**—Neil *v.* Idaho R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331. See, generally, as to the defenses of contributory negligence and assumption of risk, ante, "Principal Changes Made by Act," III, D, pp. 38, 40.

Contract, Stipulation or Device Intended to Defeat Operation of Act.—See ante, "Contract, Stipulation or Device Intended to Defeat Operation of Statute," III, G, 3, p. 64.

Former Judgment as Res Adjudicata.—As to operation of judgment in state court as res adjudicata, see ante, "To Whom Given," III, H, 1, b, pp. 93, 99.

Exclusive Operation of Federal Act.—As to defeating recovery under a state law by showing the exclusive operation of the federal act, see ante, "Exclusive or Controlling Operation of Federal Act—Superseding State Law," III, G, 2, p. 53; "Plea or Answer," III, H, 7, p. 132.

CHAPTER XX

Issues—Proof—Variance.

9. Issues, Proof and Variance.—See, generally, ante, "Declaration or Complaint," III, H, 6, p. 125; "Plea or Answer," III, H, 7, p. 132.

Presumption and Burden of Proof.—See ante, "Declaration or Complaint," III, H, 6, p. 125; "Plea or Answer," III, H, 7, p. 132.

As to Pullman employees, express agents running on trains, etc., see ante, "When Railroad or Employee Engaged in Interstate Commerce," III, G, 4, pp. 67, 77.

Variance—Right to Recover under Either Act as Evidence May Show Case under One or the Other—Effect of Pleading Wrong Statute.—See, generally, ante, "Exclusive and Controlling Operation of Federal Act—Superseding State Law," III, G, 2, pp. 53, 61; "Declaration or Complaint," III, H, 6, p. 125.

As the federal act supersedes the common law and the statutes of the state only in so far as they affect causes arising in interstate commerce, it has been held that where the plaintiff bases his cause of action upon that act, but the evidence fails to show a right of recovery thereunder, he may still have his case submitted under the state statute, or under the common law, if the pleadings, after rejecting all references to the act, are sufficient to warrant such submission.[6] A variance between the pleading and proof in this respect, however, is not material unless it be of such a character as to mislead the opposite party.[7] In the Georgia Case, so often referred to herein, where the plaintiff

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6. **Variance—Right to recover under state or federal law as evidence may develop.**—Jones *v.* Chesapeake & O. R. Co. (Ct. App. Ky., Oct. 1, 1912), 149 S. W. 951. See, also, Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332; Ullrich *v.* N. Y., N. H. & H. R. Co. (D. C.), 193 Fed. 768.

7. **Variance not material, when.**—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

specifically based her cause of action upon the Alabama statute, but the declaration and the evidence showed a case arising in interstate commerce, and therefore within the controlling and exclusive operation of the federal act, it was held that the court might treat all reference to the Alabama statute as surplusage and permit a recovery under the federal act, and that there was no error, or none of which the defendant could complain, in refusing to permit the defendant, after the appearance term had passed, to file an amendment setting up that the case arose in interstate commerce and within the controlling operation of the federal act, such amendment being nothing more than a dilatory plea, going to show that defendant, though it might be liable to the plaintiff for the particular wrong or injury, was liable under a different statute from that sued upon.[8]

Of course where the pleadings and evidence show a case arising in interstate commerce, the federal act is exclusive, and the existence of a right of action under the state law or the common law cannot be claimed. The federal law then becomes the only law under which the action can be prosecuted and a recovery had. It is the law of the case by which the rights of the employee and the liability of the carrier are to be measured.[9] Where, therefore, the plaintiff's petition, as ruled by the state court, states a case under the state statute, but the evidence shows a case arising in interstate commerce and controlled by the federal act, the situation presented is that of the case pleaded not proved, and the case proved not pleaded, and the defendant, having, in proper time, and in the proper manner, raised the objection and called the attention of the court to the fact that the

8. **Same—Erroneous reference to statute treated as surplusage.**—Southern Ry. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086. See, also, Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135, 137.

9. **Where pleadings and evidence show case under federal act.**—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. Sh., 57 L. Ed. 703, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874; St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 33 S. Ct. 651; Cound *v.* Atchison, etc., Ry. Co. (C. Ct. W. D. Texas, El Paso Div., Nov. 6, 1909), 173 Fed. 527, 531.

case is controlled by the federal statute, is entitled, after the evidence is in, to raise again the objection that the federal statute must control, and that the plaintiff is not entitled to recover upon the case as proved.[10]

By the same token, where an action brought by a personal representative and based specifically upon the federal act cannot be sustained under that act for the reason that the cause of action, if any, arose before the federal statute went into effect, no recovery can be had upon the action, as brought, under a state law which gives the right of action, not to the personal representative of the deceased, but to his parents, since damages to the estate of a deceased minor for which a personal representative might maintain an action would be a distinct cause of action from damages to his parents resulting from his death and for which the statute gives a cause of action to the parents.[11]

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10. **Where the pleadings clearly present one case and the evidence another.**—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, 57 L. Ed. 651, 653, 33 S. Ct. 651, Mr. Justice Lamar, dissenting.

11. **Same—Where pleadings present case under federal act and evidence shows case under state law.**—Winfree *v.* Northern Pac. R. Co., 227 U. S. 296, 57 L. Ed. —, 33 S. Ct. 273, affirming 173 Fed. 65.

CHAPTER XXI

Dismissal and Nonsuit.

10. Dismissal and Nonsuit.—The declaration in the Federal Act of April 22, 1908, that contributory negligence shall not bar a recovery is equivalent to a declaration that the court shall not direct a nonsuit upon the ground that the plaintiff's own evidence shows him to be guilty of contributory negligence;[12] and this applies of course where the plaintiff sues in the state court and invokes the benefit of the federal act, any state law with respect to contributory negligence or rule of practice to the contrary notwithstanding.[13]

Where the action was originally brought in the state court to enforce an alleged common-law liability, and that court had power, in its discretion, to dismiss the entire action without prejudice, it was equally within its power to dismiss without prejudice to the commencement of a new action under the federal act.[14]

Nonsuit as to One Party in Case of Fraudulent Joinder.—In a railway engineer's action for injuries against his employer and another railroad corporation whose road it had leased, where it appeared that he was assigned for duty, and had for some time been engaged in hauling trains over that part of the lessee's system which included a portion of the lessor's road, that this was being done by the lessee with the consent of the lessor and while operating under the lessor's franchise, that at the time of the injury the engine, defects in which caused the injury, was

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12. **Contributory negligence no ground for nonsuit.**—Horton *v.* Seaboard Air Line Railway, 157 N. C. 146, 72 S. E. 958.

13. **Same—Applies to case in state court.**—Horton *v.* Seaboard Air Line Railway, 157 N. C. 146, 72 S. E. 958.

14. **Dismissal without prejudice, when.**—Oliver *v.* Northern Pac. R. (Dist. Ct. E. D. Wash.), 196 Fed. 432.

on a siding connected at both ends with the main line of the lessor's road where it was being oiled and inspected by plaintiff for the purpose of making a trial trip, which could only be done by passing over a portion of the lessor's road, it was held, upon objection that the plaintiff had made a fraudulent joinder of parties defendant and had fraudulently based his action upon the federal act for the purpose of preventing a removal of the cause, that a nonsuit as against the lessor was improperly granted, it being a permissible inference from the facts that the cause of action against it was well laid.[15]

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15. **Nonsuit as to one party in case of fraudulent joinder.**—Lloyd *v.* North Carolina R. Co. (N. C.), 78 S. E. 489.

CHAPTER XXII

Instructions.

11. Instructions.—The general rules of law relating to instructions which are more favorable to the objecting party than is warranted by the law and the facts in the case applies to actions for injuries brought under the federal act, and a party cannot complain of a failure to instruct under the act where the rules of law, as stated in the instructions given, were more favorable to it than the rules prescribed in the act itself.[16] Thus the defendant cannot complain of a failure to instruct under the federal act, which destroys the defense of negligence of fellow servants, where the jury were instructed that plaintiff could not recover if the injuries were caused by a fellow servant;[17] nor of the failure to give the law as to comparative negligence, as laid down in the act, where the charge given permitted a recovery only in the event the jury should find the defendant negligent and the plaintiff free from contributory negligence, the instruction given being more favorable to the defendant than the rule prescribed by the federal act.[18]

On the other hand, instructions in an action by a railroad employee for a personal injury, given on the theory that the action is based on the federal statute, even if erroneous, because not warranted by plaintiff's pleading, are not prejudicial to defend-

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16. **Instructions stating law too favorably to objecting party.**—Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852; Galveston, etc., R. Co. *v.* Averill (Tex. Civ. App.), 136 S. W. 98; Southern R. Co. *v.* Ansley, 8 Ga. App. 325, 68 S. E. 1086; Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

17. **Same.**—Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852.

18. **Same.**—Atchison, etc., R. Co. *v.* Mills, 53 Tex. Civ. App. 359, 116 S. W. 852; Galveston, etc., R. Co. *v.* Averill (Civ. App., March 8, 1911, on motion for rehearing, April 12, 1911), 136 S. W. 98.

ant, unless the rules of liability under such statute are more burdensome than those under the alternative state statute.[19] In the case of Erie R. Co. *v.* Kennedy, the plaintiff's petition described generally the right of action alleged without specifying whether he based it specifically upon the federal or the state statute. The defendant in its answer stated that it was a carrier by rail engaged in interstate commerce, and that the plaintiff was engaged in such commerce at the time of his injury, but insisted at the trial that the case did not fall within the federal act because the petition did not so bring it. The court, however, after the evidence was in, instructed the jury upon the theory that the action was based upon the federal act, and it was held by the Circuit Court of Appeals that without regard to whether the case properly arose under the federal law or the state law, judgment for the plaintiff should be affirmed, the instructions given not being shown to be more burdensome to the defendant than they would have been had they been given upon the theory that the case arose under the state law.[20]

Instructions upon Assumption of Risk.—In an action brought by an engineer whose eye was injured by the explosion of an unguarded water guage, the engineer by using the engine in that condition assumed the risk of injury, unless he complained to the proper servant of the master and was assured that the defect would be remedied, in which case he was justified in continuing to use the engine for a reasonable length of time; consequently, a charge to that effect, which also informed the jury that he assumed the risk of injury if the defect was so dangerous that a reasonable man would not continue to use the engine, is more favorable to the railroad company than is proper.[21]

A requested instruction upon the subject of assumption of

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19. **Same.**—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 6th Cir., Nov. 7, 1911), 191 Fed. 332.

20. **Same.**—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

21. **Instructions upon assumption of risk.**—Horton *v.* Seaboard Air Line R. Co., 157 N. C. 146, 78 S. E. 494.

risk is properly refused where it is couched in such general and sweeping terms that it is not calculated to give the jury an accurate understanding of the law upon that subject, or to direct their attention to the particular phase of the case to which it is deemed applicable.[22]

Instructions upon Apportionment or Diminution of Damages.—See post, "Damages," III, H, 12, pp. 146, 151.

Defining Pecuniary Loss or Aid.—See post, "Damages," III, H, 12, pp. 146, 148.

Sufficiency of General Exceptions to Instructions.—Under the rule that where an instruction embodies several propositions of law, to some of which no objection properly could be taken, a general exception to the entire instruction will not entitle the exceptor to take advantage of a mistake or error in some single or minor proposition therein, a general exception to an instruction dealing at length with the question of the measure of damages in a negligence suit does not cover the specific objection that the statement therein that, if the verdict be for the plaintiff, he shall be awarded "such an amount of damages, not exceeding $20,000, as will compensate him for the injury," erroneously conveys to the jury an intimation that a finding that the plaintiff's damages amounted to that sum would be justified by the evidence.[23]

A general exception to a charge, on the ground that it erroneously submitted the case under a federal statute, which was not applicable to the case made by the pleadings, is not sufficient to sustain assignments of error based on specific differences between the rules of liability stated and those prescribed by the alternative state statute.[24]

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22. Same—Too sweeping and general in terms.—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 654, 33 S. Ct. 654.

23. Sufficiency of general exceptions to instructions.—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, Adv. S., 57 L. Ed. 651, 657, 33 S. Ct. 654.

24. Same.—Erie R. Co. *v.* Kennedy, 112 C. C. A. 76, 191 Fed. 332.

CHAPTER XXIII

Damages.

12. Damages.—Upon Cause of Action Accruing to Injured Employee.—The federal act, says Mr. Justice Lurton, declares two distinct and independent liabilities, resting upon the common foundation of a wrongful injury, but based upon altogether different principles.[25] It plainly declares the liability of the carrier to its injured servant, and if he survives, he may recover such damages as will compensate him for his expense, loss of time, suffering, and diminished earning power.[26] But if he does not live to recover upon his own cause of action, what then? As to causes of action accruing under the Act of April 22, 1908, prior to its amendment by the Act of April 5, 1910, it is settled beyond controversy that the cause of action given by the act to the deceased did not survive his death, and that in an action by his personal representative for the benefit of the persons named in the act, no recovery could be had for the conscious suffering of the deceased nor for any other item or element of damage for which he might have recovered had he lived.[27]

Now, however, by § 2 of the Act of April 5, 1910, adding § 9

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25. Damages—Distinct liabilities created by act.—Michigan Central R. Co. *v.* Vreeland, 33 Sup. Ct. Rep. 192, 193, 227 U. S. 59, 65, 57 L. Ed. —.

26. Damages upon cause of action accruing to injured employee.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 65, 33 S. Ct. 192, 57 L. Ed. —.

27. Same—Damages in case of death—Prior to Amendment of April 5, 1910.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703; Cain *v.* Southern R. Co. (C. Ct. E. D. Tenn.), 199 Fed. 211, 212; Fulgham *v.* Midland Valley R. Co. (C. C. W. D. Ark.), 167 Fed. 660; Walsh *v.* New York, etc., R. Co. (C. C.), 173 Fed. 494; Melzner *v.* Northern R. Co. (S. Ct. Mont.), 127 Pac. 1002.

to the Act of April 22, 1908, it is expressly provided that the right of action given by the act to the person suffering injury shall, in the event of his death, survive to the personal representative for the benefit of the persons named in the act, but with only one recovery for the same injury. This amendment clearly contemplates that while there is to be but one recovery for the same injury in cases resulting in the death of the person injured, that one recovery is to be had upon two independent and essentially different causes of action combined into one, and that, in addition to the damages recoverable for the pecuniary loss or injury in the independent cause of action given by the act as it originally stood, the plaintiff is now entitled to recover a further sum upon the cause of action given to the person injured, and which now survives; so that recovery may now be had for the injury and suffering sustained by the deceased, as well as for the pecuniary loss or injury resulting to the beneficiaries from his death. Such, at least, seems to be the logic of the cases.[28]

Upon Cause of Action Accruing upon Death of Injured Employee.—This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is, therefore, a liability for the deprivation and loss pecuniarily resulting to them from the wrongful death of the decedent, and for that only.[29]

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28. Same—Damages in case of death subsequent to Amendment of April 5, 1910.—Northern Pac. R. Co. *v.* Maerkl, 198 Fed. 1; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211. See, also, Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192; St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703. Contra: Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

29. Damages upon cause of action accruing upon death of injured employee.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 33

Pecuniary Loss Defined.—A pecuniary loss or damage must be one which can be measured by some pecuniary standard. It is a term employed judicially, says the Supreme Court, "not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation."[30] It is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived.[31]

By pecuniary aid, or support, is meant not only money, but anything that can be valued in money.[32] It includes, therefore, damages for the loss of the services of the husband, wife or child;[33] and in the case of a surviving wife, compensation for the loss of support and maintenance, or whatever financial benefit might reasonably have been expected from her husband had he continued alive and uninjured.[34]

S. Ct. 192, 195; American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224; Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, 57 L. Ed. —, 33 S. Ct. 426; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211, 212; Thomas *v.* Chicago, etc., R. Co. (D. C. N. D. Iowa), 202 Fed. 766.

30. **Pecuniary loss defined.**—Michigan Central R. Co. *v.* Vreeland, 33 Sup. Ct. Rep. 192, 196, 227 U. S. 59, 71, quoting Patterson Railway Accident Law, § 401.

31. **Same—Not dependent upon legal liability to support.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 71, 33 Sup. Ct. Rep. 192, 196; American Railway Co. *v.* Didricksen, 227 U. S. 145, Adv. S., 57 L. Ed. 224, 33 S. Ct. 224; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211, 212.

32. **Pecuniary aid or support not limited to money.**—St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, rehearing denied Oct. 12, 1912.

33. **Includes damages for loss of services.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192.

34. **Compensation to surviving wife for loss of support, maintenance, and financial benefit.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192.

When the beneficiary is a minor child, recovery may be had for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.[35] The duty of the mother of minor children being that of nurture, and of intellectual, moral, and physical training, such as when obtained from others must be for financial compensation, it has been held that the deprivation thereof is such a loss as admits of definite pecuniary valuation, provided there be evidence of the fitness of the parent and that the child has been actually deprived thereof.[36] And it has been intimated that in such a case an instruction authorizing recovery for the loss of a mother's "care and advice" would not be erroneous.[37]

On the other hand, damage for pecuniary loss or injury excludes all consideration of punitive elements, such as recompense for grief, wounded feelings of survivors, loss of society, affection, or companionship.[38] Thus the loss to the parents of the society and companionship of a son is not a pecuniary loss, and therefore is not an element of the damages recoverable in an action brought under the federal act,[39] and it is error for the court to instruct the jury that, in estimating the damages re-

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35. Where beneficiary is a minor child; loss of counsel, care, training, etc.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 33 S. Ct. 192, 196; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211; Duke *v.* St. Louis, etc., R. Co. (C. Ct. W. D. Ark. Ft. Smith Div. July 20, 1909), 172 Fed. 684; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, rehearing denied Oct. 12, 1912.

36. Same—Loss of mother's care.—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192, 197.

37. Same—Same.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 67, 57 L. Ed. —, 33 S. Ct. 192, 197.

38. All consideration of punitive elements excluded.—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 33 Sup. Ct. Rep. 192, 196; American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224; Cain *v.* Southern R. Co. (C. C. E. D. Tenn.), 199 Fed. 211, 212; St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App.), 149 S. W. 1178, rehearing denied Oct. 12, 1912.

39. Same—Loss of society and companionship.—American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224.

coverable in an action brought against a railway carrier under the Act of April 22, 1908, for the benefit of the parents of an employee killed in the carrier's service, they may "take into consideration the fact that they are the father and mother of the deceased, and the fact that they are deprived of his society and any care and consideration he might take of them or have for them during his life," especially where there is no allegation of any such loss, nor any evidence relating to the subject, or from which its pecuniary value may be estimated.[40]

In another case the court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings," and that they were to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The court then went further, and instructed the jury that, "in addition to that, independent of what he was receiving from the company, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." The Federal Supreme Court held that this threw the door open to the widest speculation, leaving the jury no longer confined to a consideration of the financial benefits which might reasonably have been expected from her husband in a pecuniary way, and in reversing the judgment, said:

"Neither 'care' nor 'advice,' as used by the court below, can be regarded as synonymous with 'support' and 'maintenance,' for the court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that

40. **Same—Erroneous instruction authorizing recovery.**—American R. Co. *v.* Didricksen, 227 U. S. 145, 57 L. Ed. —, 33 S. Ct. 224.

in some degree that service might include as elements 'care and advice.' But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such 'care and advice from their own experiences as men.' These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband. In this part of the charge the court erred."[41]

Apportionment or Diminution of Damages in Case of Contributory Negligence.—Under the federal act, the jury, in estimating damages, are required to take into consideration any contributory negligence of the person injured,[42] and the direction in the act, that the diminution of damages in case of plaintiff's contributory negligence shall be in proportion to the amount of negligence attributable to the injured employee, can only mean that where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both.[43]

Thus in an action for the death of a railroad freight conductor in a collision with a following passenger train on a switch, where it appeared that decedent was negligent in failing to see that the switch was closed after his train had passed thereon, while the engineer of the following train was also negligent in failing to discover that the switch was open in time to have stopped his train, it was held that the court properly charged

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41. **"Care" and "advice" of deceased husband not an element of recovery.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 73, 74, 57 L. Ed. —, 33 S. Ct. 192, 197, 189 Fed. 496.

42. **Apportionment or diminution of damages in case of contributory negligence.**—Cain *v.* Southern R. Co. (C. C. E. D. Tenn. N. D. March 10, 1911), 199 Fed. 211, 212.

43. **Rule of apportionment.**—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, Adv. S., 57 L. Ed. 654, 33 S. Ct. 654; Louisville, etc., R. Co. *v.* Wene (C. C. A.), 202 Fed. 887.

that the decedent was guilty of contributory negligence, and that, after the jury had found the amount of damages to which the decedent's next of kin would be entitled in the absence of decedent's contributory negligence, they should abate that sum by the amount they should find represented decedent's proportionate contributory negligence, the Circuit Court of Appeals saying, with reference to such instruction:

"Manifestly, to give effect to the act, it is essential that the relative amounts of damages caused by the negligence of the respective parties should be declared, and we know of no fairer method than that followed by the trial judge in this case."[44]

An instruction that the federal act requires that where the plaintiff has been guilty of contributory negligence, the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee, is not objectionable because the court further said that such negligence "goes by way of diminution of damages," since this statement must not be regarded as a qualifying one, but merely as intended to repeat the statutory requirement in somewhat different terms.[45]

But the use in the same instruction of the additional words, "as compared with the negligence of the defendant," is improper, the Supreme Court of the United States saying with reference to such instruction:

"But for the use in the second instance of the additional words, 'as compared with the negligence of the defendant,' there would be no room for criticism. Those words were not happily chosen, for to have reflected what the statute contemplates they should have read, 'as compared with the combined negligence of himself and the defendant.' We say this because the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full

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44. Same.—Louisville, etc., R. Co. *v.* Wene (C. C. A.), 202 Fed. 887, 891.

45. Same—Instruction held not erroneous.—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, 57 L. Ed. 654, 33 S. Ct. 654.

damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; the purpose being to abrogate the common law rule completely exonerating the carrier from liability in such a case, and to substitute a new rule, confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."[46]

Amount of Damages.—No hard and fast rule by which pecuniary damages may in all cases be measured is possible.[47] The rule must differ according to the relation between the parties plaintiff and the decedent, according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled;[48] and in addition, the amount of recovery depends on the age, character, earning capacity, habits, and morals of the deceased, and, in the case of a father, on his care, attention, and solicitude for his children.[49]

A verdict for $15,000 for injury to a brakeman, twenty-four years old, earning $80 to $85 per month, having a life expectancy of thirty-nine and a half years, whose health, prior to the injury, was good, and thereafter poor, who suffered severe pain at the time of the accident and for four or five days thereafter, and whose right arm was amputated two inches below the elbow, has been held excessive and reduced to $12,000.[50]

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46. **Same—Addition of certain words held erroneous.**—Norfolk, etc., R. Co. *v.* Earnest, 229 U. S. 114, Adv. S., 57 L. Ed. 654, 656, 33 S. Ct. 654, citing Second Employers' Liability Cases, 223 U. S. 1, 50, 56 L. Ed. 327, 346, 32 S. Ct. 169, 38 L. R. A. (N. S.) 44.

47. **Amount of damages—No hard and fast rule.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192, 196.

48. **Varies according to relation of parties, etc.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192, 197.

49. **Affected by age, habits, character and earning capacity.**—Duke *v.* St. Louis, etc., R. Co. (C. Ct. W. D. Ark. Ft. Smith Div., July 20, 1909), 172 Fed. 684.

50. **Verdict for $15,000 held excessive here.**—Bradbury *v.* Chicago, R. I. & P. Ry. Co., 149 Iowa 51, 128 N. W. 1.

In another case it appeared that the deceased at the time of his death was twenty-nine years old, with a life expectancy, if he had been in normal health, of thirty-six years. He was married in 1900 at the age of twenty, and during the succeeding nine years, while apparently industrious, had spent several thousand dollars of his wife's estate and all he had made himself, leaving at his death only $250. Before marriage he taught school, and after marriage did hauling, stacked lumber in a sawmill, worked on a farm a year, and then began braking on defendant's railroad, having contributed to his family, consisting of wife and five children, an average of about $34 a month. During his marriage he had suffered from a bronchial cough, for which he had been confined in a hospital, where it was discovered that one of his lungs was dead, and a physician testified that this condition would greatly shorten his life. It was held that a verdict for $17,545 was excessive, and should be reduced to $6,000.[51]

In still another case the court, after stating the foregoing principles, but without reciting the evidence, reduced a verdict of $10,000 for the death of the deceased to $7,500, taking into consideration the fact that he had been guilty of such contributory negligence as would, independently of the statute, have barred all recovery, and excluding all allowance for suffering which the deceased might have recovered had he survived, the injury having been sustained prior to the Amendment of April 5, 1910.[52]

Where decedent's legs were both mashed off to the knees by being run over by a train, and he was not treated by a physician for an hour and a half after the injury, and lived for five hours thereafter, suffering great pain, at least until the physician's arrival, and also suffering great mental anguish in contempla-

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51. **Verdict for $17,545 reduced to $6,000 here.**—Duke *v.* St. Louis, etc., R. Co. (C. Ct. W. D. Ark. Ft. Smith Div., July 20, 1909), 172 Fed. 684.

52. **Recovery of $10,000 reduced to $7,500 on account of contributory negligence.**—Cain *v.* Southern R. Co. (C. C. E. D. Tenn. N. D. March 10, 1911), 199 Fed. 211, 213.

tion of death, continually begging others to pray for him, it was held that a verdict of $10,000 for pain and mental anguish suffered by him was excessive, requiring a reversal unless reduced to $5,000.[53] This case was reversed on other grounds, however, on a writ of error to the Supreme Court of the United States.[54]

Where the deceased, who was a conductor on a freight train, was killed in the yards by reason of his own negligence while on his way to enter the caboose of his train, which had just been made up, the negligence on his part consisting in his failure to observe or heed the signals of the switch engine, and in walking down the track ahead of the same, no negligence whatever being shown upon the part of the railway company, the court said that a verdict of $35,000 for his death would have been excessive, even if it had been shown that the railroad company was negligent.[55]

Apportionment of Damages among Beneficiaries.—See, also, ante, "For Whose Benefit," III, H, 1, c, pp. 105, 109.

As heretofore noticed, the action given by the federal act is not for the equal benefit of those shown to be entitled to recover, but the recovery, though for a gross amount, is to be apportioned by the jury to each beneficiary according to his or her individual pecuniary loss, and this, says the Supreme Court, will of itself exclude any recovery on behalf of such as show no pecuniary loss, regardless of the relation they may have sustained to the deceased.[56]

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53. Verdict for $10,000 for mental pain and anguish reduced to $5,000.—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874.

54. Same—Reversed on other grounds.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, Adv. S, 57 L. Ed. 703, 704, 33 S. Ct. 703, reversing 98 Ark. 240, 135 S. W. 874.

55. Award of $35,000 held grossly excessive in any case here.—Neil *v.* Idaho, etc., R. Co. (S. Ct. Idaho, June 4, 1912), 125 Pac. 331.

56. Apportionment of damages among beneficiaries.—Gulf, etc., R. Co. *v.* McGinnis, 228 U. S. 173, Adv. Sh., 57 L. Ed. —, 33 S. Ct. 426, 427. Accord: St. Louis, etc., R. Co. *v.* Geer (Tex. Civ. App. Dallas, June 22, 1912, rehearing denied Oct. 12, 1912), 149 S. W. 1178.

CHAPTER XXIV

Appeal and Error.

13. Appeal and Error.—In State Courts.—Where the evidence in an administrator's action against a railroad company for damages to the next of kin from the death of a fireman, resulting from defendant's alleged negligence, showed that the train was being run from a point in Arkansas to a point in another state when the accident occurred, but did not show whether it was engaged in interstate commerce, and the defendant asked a peremptory instruction that plaintiff was not entitled to recover for pain and suffering by decedent, it was held that, in view of the evidence, the request for a peremptory instruction was sufficient to raise, on appeal, the question whether plaintiff was entitled to recover for such pain and suffering under the federal act.[57]

From Lower Federal Court to Supreme Court.—That the constitutionality of the federal act was drawn in question by the plaintiff in error in the lower court affords ground for taking the case directly to the Supreme Court of the United States.[58]

Same—Dismissal—Decision of Constitutional Question Pending Appeal.—A writ of error from the Federal Supreme Court will not be dismissed because the constitutional questions which furnished the ground for bringing the case directly to the Supreme Court have, since the allowance of the writ of error, been decided by that court in another case ad-

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57. **Appeal and error—In State courts.**—St. Louis, etc., R. Co. *v.* Hesterly, 98 Ark. 240, 135 S. W. 874, reversed, on other grounds, in 228 U. S. 702, Adv. S., 57 L. Ed. 703, 33 S. Ct. 703.

58. **From lower federal court to Supreme Court—Constitutional question.**—Michigan Cent. R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192.

versely to the plaintiff in error. The constitutional questions which gave the right to carry the case direct to the Supreme Court not having been foreclosed when the writ of error was allowed, that court still has jurisdiction to consider other assignments of error.[59]

From Circuit Court of Appeals—Amount in Controversy.—A writ of error lies from the Federal Supreme Court to review a judgment of a circuit court of appeals which affirmed a judgment of the circuit court, founded upon the Employers' Liability Act of April 22, 1908, where the matter in controversy exceeds $1,000.[60]

Same—Harmless Error.—Holdings of a circuit court of appeals, when affirming a judgment of a circuit court in an action to recover damages for personal injuries, to the alleged effect that the federal act abolished, as to all cases coming under its provisions, the defense of assumption of risk, and that a railroad employee injured in the course of his employment could avail himself of the benefits of the statute, although at the time of the injury he was not actually engaged in interstate commerce, furnish no ground for reversal, where the benefit of the defense of assumption of risk was accorded to the railway company at the trial, and the right of the employee to recover was made dependent upon his establishing that at the time he was injured he was actually engaged in interstate commerce.[61] And where the record shows that there was evidence that the cars on which the accident occurred, and which were being transferred by a switch engine, were loaded with merchan-

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59. **Same—Decision of constitutional question pending appeal as ground for dismissal.**—Michigan Central R. Co. *v.* Vreeland, 227 U. S. 59, 57 L. Ed. —, 33 S. Ct. 192; Norfolk, etc., R. Co. *v.* Earnest, Adv. S., 57 L. Ed. 654, 229 U. S. 114, 33 S. Ct. 654.

60. **From Circuit Court of Appeals—Amount in controversy.**—Missouri, etc., R. Co. *v.* Wulf, 226 U. S. 570, 57 L. Ed. 274, 33 S. Ct. 135.

61. **Same—Harmless error.**—Seaboard Air Line R. Co. *v.* Moore, 228 U. S. 433, Adv. S., 57 L. Ed. 580, 33 S. Ct. —. See, also, ante, "Instructions," III, H, 11, p. 143.

dise destined for a port, to be there transshipped to destination in another state, and that the court instructed the jury that the plaintiff could only recover under the Employers' Liability Act of 1908, in case it found that he was engaged in interstate commerce, the Federal Supreme Court will not, in the absence of clear conviction of error, disturb the judgment based on the verdict.[62]

Same—Penalty on Affirmance.—The judgment of a circuit court of appeals, affirming a judgment of the trial court in a negligence action, on the ground that, though the evidence was conflicting, that for the plaintiff was sufficient to sustain the verdict in his favor, will be affirmed with ten per cent damages where the Supreme Court concurs in this view, and there is no question of law involved.[63]

From State Court of Last Resort to Supreme Court of United States—Federal Questions.—While it is not necessary to plead the federal act, an alleged right thereunder, not specially set up in the state court and there passed upon, cannot be considered by the Federal Supreme Court on writ of error to the state court.[64] A federal question must be deemed to have been presented with sufficient clearness, however, to sustain a writ of error from the Federal Supreme Court to a state court, where the latter court has held that the question was sufficiently raised and decided it.[65] Thus the objection that a carrier, sued for the death of an employee, was estopped to rely upon the Federal Act of April 22, 1908, by having pleaded con-

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62. Judgment not disturbed in absence of clear conviction of error.—Seaboard Air Line R. Co. *v.* Moore, 228 U. S. 433, Adv. S., 57 L. Ed. 580, 33 S. Ct. 580.

63. Penalty on affirmance.—Texas, etc., R. Co. *v.* Prater, 229 U. S. 177, 57 L. Ed. 637, 33 S. Ct. 637.

64. From state court of last resort to Federal Supreme Court—Federal questions.—Chicago, etc., R. Co. *v.* Hackett, 228 U. S. 559, Adv. S, 57 L. Ed. 581, 33 S. Ct. 581.

65. When federal question sufficiently presented.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703.

tributory negligence, and thus having relied upon the state law, is not available to defeat a writ of error from the Federal Supreme Court to the state court, where the latter court held that the federal question was sufficiently raised and decided it.[66] Moreover, since the plaintiff, and not the defendant, had the election as to how the suit should be brought, and as he relied upon the state law, the defendant had no choice if it was to defend upon the facts.[67]

The contention of a defendant railway company, sued in the state courts under a state statute, for the death of an employee, that the injuries which caused the death were received while the company was engaged, and while he was employed by it, in interstate commerce; that its liability for his death was exclusively regulated and controlled by the Employers' Liability Act of April 22, 1908, and that, if liable, it was liable only to his personal representatives, and not to the plaintiffs—present federal questions which, when decided by the state court, will support a writ of error from the Federal Supreme Court.[68]

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66. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703.

67. Same.—St. Louis, etc., R. Co. *v.* Hesterly, 228 U. S. 702, 57 L. Ed. 703, 33 S. Ct. 703.

68. Contention that case controlled by federal act sufficient to support writ of error, when.—St. Louis, etc., R. Co. *v.* Seale, 229 U. S. 156, Adv. S., 57 L. Ed. 651, 33 S. Ct. 651.

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